

21
No. 97-1992-CFX

Title: Vaughn L. Murphy, Petitioner
v.
United Parcel Service, Inc.

Docketed:
June 10, 1998

Court: United States Court of Appeals for
the Tenth Circuit

Entry Date

Proceedings and Orders

Jun 9 1998	Petition for writ of certiorari filed. (Response due July 27, 1998)
Jun 29 1998	Order extending time to file response to petition until July 27, 1998.
Jul 27 1998	Brief of respondent United Parcel Service in opposition filed.
Aug 12 1998	DISTRIBUTED. September 28, 1998
Oct 5 1998	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 4 1998	Supplemental brief of respondent United Parcel Service, Inc. filed.
Dec 21 1998	Brief amicus curiae of United States filed.
Jan 4 1999	REDISTRIBUTED. January 8, 1999
Jan 8 1999	Petition GRANTED. limited to Questions 1 and 4 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 22, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 24, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT April 27, 1999.

Feb 19 1999	Brief amicus curiae of American Diabetes Association filed.
Feb 22 1999	Brief amici curiae of Senators Harkin and Kennedy, et al. filed.
Feb 22 1999	Joint appendix filed.
Feb 22 1999	Brief of petitioner Vaughn Murphy filed.
Feb 22 1999	Brief amici curiae of Massachusetts, et al. filed.
Feb 22 1999	Brief amicus curiae of United States and Equal Employment Commission filed.
Feb 22 1999	Brief amicus curiae of National Employment Lawyers Association filed.
Mar 10 1999	Record filed.
Mar 11 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 16 1999	Record filed.
Mar 17 1999	CIRCULATED.
Mar 23 1999	Brief amicus curiae of Society For Human Resource Management filed.
Mar 24 1999	Brief of respondent United Parcel Service, Inc. filed.
Mar 24 1999	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Mar 24 1999	Brief amici curiae of American Trucking Associations, et al.

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Entry Date

Proceedings and Orders

Mar 29 1999	filed. Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 8 1999	Reply brief of petitioner Vaughn Murphy filed.
Apr 27 1999	ARGUED.

No.

971992 JUN 9 1998

In The

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1997

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit*

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

1. Whether the ADA, 42 U.S.C. § 12112(a), requires that Mr. Murphy's hypertension be evaluated in its unmedicated state?
2. Whether United Parcel Service, Inc. (UPS) may use a Department of Transportation (DOT) Regulation, 49 C.F.R. § 391.41, that governs a driver's hypertension, to justify firing Mr. Murphy, a mechanic, when he has already been issued a DOT health card?
3. Whether there was no genuine dispute whether Mr. Murphy was able to perform all the essential job functions of a mechanic at UPS with reasonable accommodation?
4. Whether there was no genuine dispute whether UPS regarded Mr. Murphy as disabled and fired him because of his hypertension?

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Mr. Vaughn Murphy, Petitioner, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a through 6a) is an unpublished opinion. The opinion of the District Court (App., *infra*, pp. 7a through 37a) is reported at 946 F. Supp. 872.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 11, 1998 (App., *infra*, p. 1a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title I of The Americans With Disabilities Act, 42 U.S.C. § 12101g, *et seq.* (App., *infra*, pp. 38a through 41a). The Equal Employment Opportunity Commission's Regulations and Interpretative Guidance under 29 C.F.R. § 1630, *et seq.* (App., *infra*, pp. 42a through 46a). Department of Transportation Regulations 49 C.F.R. Part 391.41(b)(6). (App., *infra*, p. 47a). Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

Vaughn Murphy, age 45, has had high blood pressure since age 10. Unmedicated, his blood pressure is 250/160. Blood pressure in excess of 140/90 is high. Mr. Murphy worked as a mechanic for 22 years for Ryder Truck Rental. When Ryder closed the Salina, Kansas branch, Mr. Murphy applied at United Parcel Service, Inc. (UPS) in Topeka, Kansas. He filled out the

application, took a test and submitted to a Department of Transportation (DOT) physical. He passed the test. The DOT physical examiner gave him a DOT health card and certified him as safe to drive. Mr. Murphy started work. His work was at all times satisfactory. A month later a UPS nurse reviewed his DOT physical and noticed his blood pressure was reported as 186/124. She ordered him off work to be re-tested. Mr. Murphy was re-tested, but not in accordance with DOT guidelines at 49 C.F.R. § 391.41(b)(6). When re-tested, with his job on the line, his blood pressure was 160/104 and 160/102. UPS required him to have a blood pressure of 160/90 or below. DOT Regulations, 49 C.F.R. § 391.41(b)(6), qualify a driver to drive if his blood pressure is not likely to interfere with his ability to operate a commercial motor vehicle safely. Both the DOT examiner and Mr. Murphy's personal physician certified him as safe to drive. Nevertheless, UPS fired Mr. Murphy because of his high blood pressure.

BASIS FOR FEDERAL JURISDICTION AND DECISIONS BELOW

Jurisdiction in the United States District Court for the District of Kansas was invoked pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 12117 and 42 U.S.C. § 2000e-5. On October 22, 1996, District Judge Sam Crow dismissed Mr. Murphy's case by granting UPS's motion for summary judgment on the grounds that Mr. Murphy was not disabled in his medicated state, that UPS did not regard him as disabled, that driving was an essential job function of a mechanic at UPS, that UPS could rely on DOT regulations and that UPS did not fail to reasonably accommodate Mr. Murphy. On March 11, 1998 the United States Court of Appeals for the Tenth Circuit affirmed in an unpublished opinion.

REASONS FOR GRANTING THE WRIT

In granting Mr. Murphy's Petition in this case the Court has the opportunity to rule on as much or as little of Title I of the ADA as the Court deems prudent. The main issue worthy of review is whether the ADA requires courts to evaluate employees in their medicated or unmedicated state. The circuits are split 7-2 for unmedicated. Three circuits have not decided the issue. This Court could also review the gross epidemic of courts dismissing employment cases on summary judgment when there are clearly genuine issues of material fact to be decided by a jury.

I.

THERE IS A CLEAR, WELL DEVELOPED SPLIT AMONG THE CIRCUITS WHETHER COURTS SHOULD EVALUATE AN ADA PLAINTIFF IN THEIR MEDICATED OR UNMEDICATED STATE.

The Court of Appeals for the Tenth Circuit ruled that the Court should evaluate ADA plaintiffs in their medicated state in determining whether they have a physical impairment that substantially limits one or more major life activities. If Mr. Murphy had applied at UPS in New Hampshire, he could be working for UPS today. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998) held that the courts should evaluate the employee's disability in its unmedicated state. The court held that the ADA does not say, "impairment plus treatment," or "impairment after treatment," or "treated impairment." It simply says "impairment." The First Circuit held that clear legislative history and the EEOC Guidelines require that courts evaluate employees in their unmedicated state. Other circuits that have ruled the same way are the Third Circuit (*Matczak v. Frankford Candy and Chocolate Company*, 136 F.3d 933 (3rd Cir. 1997)); Fifth Circuit, (*Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997), cert.

den., __ U.S. __, 118 S. Ct. 1050, 140 L. Ed. 2d 113)); Seventh Circuit, (*Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995)); Eighth Circuit, (*Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. den.*, __ U.S. __, 118 S. Ct. 693, 139 L. Ed. 2d 638); Ninth Circuit, (*Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), *cert. den.*, __ U.S. __, 117 S. Ct. 1349, 137 L. Ed. 2d 506); Eleventh Circuit, (*Harris v. H & W Contracting Company*, 102 F.3d 516 (11th Cir. 1996)).

Two circuits have ruled for employers, holding that courts should evaluate employees in their medicated state: Sixth Circuit, (*Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997)) and the Tenth Circuit in *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997).

Three circuits are undecided. The Second Circuit, the Fourth Circuit and the D.C. Circuit have not addressed this issue.

Since there is a clear, direct and substantial split of authority among the Circuits, this Court should resolve the conflict.

II.

MILLIONS OF DISABLED EMPLOYEES AND THOUSANDS OF EMPLOYERS WOULD BE AFFECTED BY THIS COURT'S RULING.

The ADA passed Congress almost unanimously in 1990 and became effective in 1992. Congress set out its findings and purposes at 42 U.S.C. § 12101. Congress found that there are 43 million disabled Americans, that disability discrimination is a severe and pervasive social problem, and, most importantly, that individuals with disabilities are a discrete and insular minority who are subject to stereotypic assumptions. Congress passed the ADA to provide a clear and comprehensive national mandate

for the elimination of disability discrimination, to provide enforceable standards, ensure that the federal government plays a central role in enforcing the standards and to invoke the full sweep of congressional authority to enforce the Fourteenth Amendment of the United States Constitution.

In July of 1998, six years will have passed since the ADA became effective. In those six years the district courts have abused summary judgment and refused to enforce employees' rights under The Americans With Disabilities Act. All across the country cases are being dismissed and employees are not given their right to a jury trial under the ADA. District courts, in their fear of a flood of litigation, have more often than not refused to let employees in the front door of the ADA by claiming that they are either too disabled or not disabled enough to come under the Act's protection. The ADA covers disabled individuals who are nevertheless able to perform all the essential job functions. Those disabilities must be in the form of a physical or mental impairment that substantially limits one or more major life activities. District courts have found it easy to rule that an employee is either not disabled enough, or too disabled, to have any rights under the Act. Employees are not disabled enough if their physical or mental impairment does not *substantially* limit a major life activity. Employees are too disabled if their disability prevents them from performing all the essential job functions with or without reasonable accommodation. The District court in this case said that Mr. Murphy "cannot have it both ways." Yet, the ADA requires that plaintiffs prove both ways. This proof should not be used to negate relief. The ADA is a broad remedial statute. *Penny v. United Parcel Service*, 128 F.3d 408, 414 (6th Cir. 1997). It is a familiar cannon of statutory construction that remedial legislation, such as the ADA, should be construed broadly to effectuate its purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S. Ct. 548, 553, 19 L. Ed. 2d 564 (1967), as quoted in *Arnold v. UPS, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998).

The Supreme Court has a wonderful opportunity in this case to render the first decision under Title I of the ADA. The ADA affects hundreds of thousands, if not millions, of individuals who rely on medication, such as people with high blood pressure like Mr. Murphy, diabetics and epileptics.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

A. Legislative history of the ADA and the EEOC's interpretative guidance require that Mr. Murphy's hypertension be evaluated in its unmedicated state.

Both the explicit language and the illustrative examples included in the ADA's legislative history make it abundantly clear that Congress intended the analysis of an "impairment" and of the question of whether it "substantially limits a major life activity" to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative affects of medication, prostheses or other mitigating measures.

Arnold v. United Parcel Service, Inc., 136 F.3d 854, 859 (1st Cir. 1998). The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, assistive or prosthetic devices. EEOC Interpretative Guidance, 29 C.F.R. § 1630.2(h) (physical impairment) and 1630.2(j) (substantially limits).

Finally, as stated above, seven of the twelve Circuits have affirmatively decided the issue in accord with the EEOC. Only

two have decided against the EEOC Guidelines and three remain undecided.

Mr. Murphy's unmedicated blood pressure runs at 250/160. His doctors diagnosed his hypertension as severe Stage IV hypertension. Without medication he would have to be hospitalized, would surely incur end organ damage, and eventually die from the high blood pressure. If Mr. Murphy's blood pressure is evaluated in its unmedicated state, he clearly has a physical impairment that substantially limits major life activities. Mr. Murphy performed his work satisfactorily while he was at UPS and had a DOT health card. The only reason UPS fired him was because of his high blood pressure. This case could be resolved on this issue alone.

B. The Court of Appeals also committed error in allowing UPS to rely on DOT Regulations at 49 C.F.R. § 391.41(b)(6) because it is uncontroverted that Mr. Murphy was certified as safe to drive by the DOT examiner and by his own personal physician. Any absolute regulation that Mr. Murphy be required to have blood pressure of 160/90 would be UPS's own requirement because it was not required by DOT Regulations.

The Court of Appeals also erred in finding that Mr. Murphy was not able to perform all the essential job functions of a mechanic at UPS with or without reasonable accommodation. Mr. Murphy performed all of his job satisfactorily. He had gone out on numerous test drives with trucks with a proper driver's license and a DOT health card. If he had been stopped by the Highway Patrol he could have produced all the proper documentation to drive a UPS truck.

The Court of Appeals finally erred in holding that UPS did not regard Mr. Murphy as disabled and they did not fail to reasonably accommodate him. As proof that UPS regarded him

as disabled, Vaughn Murphy testified that his supervisor told him that he was fired because of his hypertension and said, "We can't be responsible. You might die . . . well, with that kind of blood pressure, you are going to die and we will be responsible." This is exactly the type of stereotypical thinking that the ADA was designed to stop.

Mr. Murphy also requested the reasonable accommodation of allowing him additional time to get his blood pressure down with medication. He testified that he thought he was clearly able to get his blood pressure down to below 160/90 and function effectively. UPS never gave him that opportunity. Instead, they fired him.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

1a

**APPENDIX A — ORDER AND JUDGMENT OF THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT FILED MARCH 11, 1998**

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

Case. No. 96-3380
(D.C. No. 95-CV-4126-SAC)
(District of Kansas)

VAUGHN L. MURPHY,

Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE,

Defendant-Appellee,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

ORDER AND JUDGMENT*

Before **SEYMOUR, ANDERSON**, and **HENRY**, Circuit Judges.

This is an employment discrimination case arising under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

("ADA"). Plaintiff-Appellant Vaughn Murphy appeals the district court's grant of summary judgment in favor of Defendant-Appellee, United Parcel Service, Inc. ("UPS"). The district court granted summary judgment based in part upon its finding that no rational factfinder would be able to conclude that Mr. Murphy is an individual with a disability within the meaning of the ADA. Because we agree that Mr. Murphy is not an individual with a disability within the meaning of the ADA, we affirm.

We review a grant of summary judgment *de novo*, applying the same standard that guided the district court. *Phelps v. Hamilton*, 122 F.3d 1309, 1317 (10th Cir. 1997). Summary judgment is appropriate when there is no genuine issue of material fact and, as a matter of law, the moving party is entitled to judgment. Fed. R. Civ. P. 56(c). On summary judgment, we view the evidence in the light most favorable to the nonmovant, and we draw all reasonable inferences in his or her favor. *Phelps*, 122 F.3d at 1318.

I. STATEMENT OF FACTS

Mr. Murphy has had high blood pressure for most of his life. Without medication, his blood pressure is approximately 250/160. He takes medication to control his condition.

In August 1994, Mr. Murphy applied to UPS for a position as a mechanic. Mechanics at UPS must hold commercial drivers licenses because they are required to drive large trucks in order to perform "road tests" and "road calls." In order to qualify for a mechanic position, an applicant must obtain a Department of Transportation ("DOT") health card. Therefore, as part of the application process, Mr. Murphy submitted to a physical examination. At the time of the exam, his blood pressure was

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186/124. A health card was issued to Mr. Murphy, and he accepted an offer of employment. He began working at UPS in mid-August.

In mid-September 1994, a UPS company nurse was reviewing Mr. Murphy's file, and she determined that Mr. Murphy's blood pressure did not meet DOT requirements for commercial truck drivers.¹ UPS concluded that Mr. Murphy's health card had been issued in error. UPS terminated Mr. Murphy's employment on October 5, 1994 because his blood pressure exceeded DOT safety standards for driving a commercial motor vehicle.

II. DISCUSSION

The ADA defines the term "disability," with respect to an individual, as: "(A) physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major life activities" include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1996). An impairment is substantially limiting when it renders a person unable to perform major life activities that the average person can perform, or when it significantly restricts the condition, manner, or duration under which he or she can perform the major life activity as compared to an average person. *Id.* at § 1630.2(j)(1)(i) & (ii).

The district court ruled that when determining whether Mr. Murphy's high blood pressure substantially limits a major life activity, the condition should be considered in its medicated state. *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872, 881

1. The DOT standard for commercial drivers is blood pressure or at below 160/90. *Aplt's App.* at 139 (Dep. of Dr. Robert Brown).

Appendix A

(D. Kan. 1996). The district court determined that Mr. Murphy's hypertension, when medicated, did not substantially limit him in any major life activity. *Id.* at 881-82. Mr. Murphy argues that the district court should have considered his high blood pressure in its unmedicated state when determining whether he is an individual with a disability. He argues that his high blood pressure, without medication, substantially limits various major life activities, including working.

After the instant case was orally argued, this Court, in a separate and unrelated case, decided the issue of whether an impairment should be considered in its medicated/corrected state or its unmedicated/uncorrected state for purposes of determining whether the impairment substantially limits a major life activity. In *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), we held that the "determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." Therefore, we must decide whether Mr. Murphy's high blood pressure, with medication, substantially limits a major life activity. Mr. Murphy's own doctor testified that when his high blood pressure is medicated, he "functions normally doing everyday activity that an everyday person does." *Aplt's App.* at 152 (Dep. of Dr. Debra Doubek). Thus, we conclude that Mr. Murphy's high blood pressure does not substantially limit a major life activity.

Even if an impairment does not substantially limit a major life activity, a plaintiff is still covered by the ADA's protections if an employer regarded him or her as having an impairment that substantially limits a major life activity. *See* 42 U.S.C. § 12102(2)(c). The regulations promulgated pursuant to the ADA state three ways that an individual might be "regarded as" having such an impairment:

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- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the [previously defined] impairments . . . but is treated by a covered entity as having a substantially limiting impairment."

29 C.F.R. § 1630.2(f) (1997).

Mr. Murphy argues that he is entitled to ADA protection because UPS regarded him as having an impairment that substantially limits a major life activity. He argues that UPS terminated him based on the discriminatory and stereotypical view that it is too risky to employ individuals who have high blood pressure because they are likely to have heart attacks or strokes. However, UPS did not base its termination of Mr. Murphy on an unsubstantiated fear that he would suffer a heart attack or stroke. Rather, UPS terminated Mr. Murphy because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles. Thus, we conclude that UPS, in its termination decision, did not regard Mr. Murphy as having an impairment that substantially limits a major life activity.

Mr. Murphy also argues that, as a reasonable accommodation, UPS should have offered him a temporary certification and given him time to get his blood pressure down. However, because we have concluded that Mr. Murphy is not an individual with a disability, we need not reach the question of whether he is a qualified individual with a disability, i.e. whether with or without reasonable accommodation, he could perform the essential

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functions of the job. *See* 42 U.S.C. § 12111(8) (defining "qualified individual with a disability"). Likewise, we need not address his remaining contention, namely, that DOT regulations do not provide a defense to his ADA claim.

Finally, Mr. Murphy argues that UPS made illegal inquiries during his job interview. He does not link this allegation to his ADA claim, nor does he provide the court with any other legal basis for consideration of this claim. The district court did not rule on this issue. We find that, in any event, this allegation does not raise a genuine issue of material fact on Mr. Murphy's ADA claim.

For the reasons set forth above, we conclude that the district court properly granted summary judgment in favor of UPS. Accordingly, we AFFIRM the judgment of the district court.

Entered for the Court,

Robert H. Henry
Circuit Judge

**APPENDIX B — JUDGMENT AND MEMORANDUM AND
ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
FILED OCTOBER 22, 1996**

**UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

JUDGMENT IN A CIVIL CASE

CIVIL NO. 95-4126-SAC

VAUGHN L. MURPHY,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

- () **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- (X) **DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that UPS' motion for summary judgment (Dk. 39) is granted.

8a

Appendix B

IT IS FURTHER ORDERED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, United Parcel Service, Inc., recover of the plaintiff, Vaughn L. Murphy their costs of action.

Entered on the docket 10/22/96

Dated: October 22, 1996

RALPH L. DeLOACH, CLERK

s/ [illegible]
Deputy Clerk

9a

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 95-4126-SAC

VAUGHN L. MURPHY,

Plaintiff,

vs.

UNITED PARCEL SERVICE, INC.,

Defendant.

MEMORANDUM AND ORDER

Vaughn L. Murphy brings this employment discrimination action against his former employer, United Parcel Service, Inc. (UPS), for alleged violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et. seq.* Specifically, Murphy claims that UPS terminated his employment due to his disability, hypertension. According to Murphy, he suffers from high blood pressure. Unmedicated, Murphy's blood pressure runs at approximately 250/160. Murphy contends that his high blood pressure limits his major life activities of walking, seeing, lifting, climbing, performing manual tasks, eating, exercising, hearing and working.

In August of 1994, Murphy was hired as a mechanic by UPS. Prior to hiring Murphy, UPS required him to pass a physical. Murphy initially "passed" the physical examination and was issued a Department of Transportation Health Card.

Appendix B

Upon closer inspection, UPS subsequently discovered that Murphy's high blood pressure precluded him from holding a valid DOT Health Card and required Murphy to take another blood pressure test. Murphy's blood pressure was 160/102, above UPS' and the DOT's upper threshold. Based upon this determination UPS fired Murphy.

Murphy contends that this act by UPS violated the ADA. Murphy contends that he was a qualified mechanic and that UPS' act of firing him violated the ADA. Murphy contends that driving a truck was a marginal duty and that UPS failed to reasonably accommodate his disability.

UPS denies Murphy's claims. First, UPS contends that Murphy's high blood pressure does not qualify as a disability within the meaning of the ADA. Second, UPS contends that its decision to terminate Murphy was based upon his inability to lawfully perform an essential function of the job — operate a large truck. Due to Murphy's high blood pressure, he could not meet the minimally acceptable standards set by the DOT. Finally, UPS contends that its compliance with DOT regulations is a complete defense to Murphy's ADA claim, or in the alternative, that there was no reasonable accommodation available which would have permitted Murphy to perform the essential functions of his job.

This case comes before the court upon UPS' motion for summary judgment (Dk. 39). Murphy has filed a response and UPS has filed a reply. The court, having considered the briefs of the parties and the applicable law, grants UPS' motion.

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Summary Judgment Standards

A court grants a motion for summary judgment if a genuine issue of material fact does not exist and if the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law governing the suit dictates which facts are material or not. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will . . . preclude summary judgment." *Id.* There are no genuine issues for trial if the record taken as a whole would not persuade a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "[T]here are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988).

The movant's burden under Rule 56 of the Federal Rules of Civil Procedure is to lay out the basis of its motion and to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir.), *cert. denied*, 113 S. Ct. 635 (1992). "A movant is not required to provide evidence negating an opponent's claim." *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992) (citation omitted).

If the moving party meets its burden, then it becomes the nonmoving party's burden to show the existence of a genuine issue of material fact. *Bacchus Industries, Inc. v. Alvin Industries, Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *see Martin v. Nunn and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993) ("If the moving party meets this burden, the non-moving

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party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case." When the nonmoving party will have the burden of proof at trial, " 'Rule 56(e) . . . [then] requires the nonmoving party to go beyond the pleadings and by her own affidavits or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "Unsubstantiated allegations carry no probative weight in summary judgment proceedings." *Phillips v. Calhoun*, 956 F.2d 949, 951 (10th Cir. 1992) (citations omitted); see *Martin*, 3 F.3d at 1414 (non-moving party cannot rest on the mere allegations in the pleadings). "Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 928, 929 (7th Cir. 1995); see *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 479 (1st Cir. 1993) ("Optimistic conjecture, unbridled speculation, or hopeful surmise will not suffice."). The court views the evidence of record and draws inferences from it in the light most favorable to the nonmoving party. *Burnette v. Dow Chemical Co.*, 849 F.2d at 1273.

More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. R. Civ. P. 1." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). At the same time, a summary judgment motion is not the chance for a court to act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences. *Windon Third Oil and Gas v. Federal Deposit Ins.*, 805 F.2d 342, 346 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987).

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Uncontroverted Facts

Murphy has had high blood pressure, (hypertension) since he was ten years old. The only limitation placed Murphy by a physician related to his high blood pressure is that he was instructed to not hold a job requiring repetitive lifting of 200 pounds.

For over 22 years, Murphy has performed mechanic jobs that did not require DOT certification without any limitation resulting from hypertension other than the self-imposed restriction of using a lever to lift heavy objects, not running to answer the phone, not working above his head and not performing heavy or very heavy work. Murphy contends that medicated hypertension otherwise limits his ability at times and under some circumstances to run, eat, exercise, breath, hear and see.¹ However, Murphy's own physician and UPS' medical expert each testified that Murphy's hypertension does not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do.

In early August 1994, Murphy applied for a position as a mechanic at UPS. Murphy knew that driving would be part of his job duties as a UPS mechanic. Murphy also knew that as a condition of his employment, he would be required to take and pass a DOT physical and obtain a DOT health card. On August 18, 1994, Murphy was hired by UPS to work as a mechanic.

1. To the extent that these conditions exist and are not controlled by medication, they further demonstrate that UPS' decision to preclude Murphy from operating its commercial trucks on the road was a legitimate business decision and not a pretext for discrimination.

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The UPS job description for mechanic states that the essential functions include a commercial driver's license, meeting DOT regulations and operating a standard transmission. DOT regulations define a "commercial motor vehicle" as "... any self-propelled or towed motor vehicle used on public highways in interstate commerce to transport passengers or property when: (a) The motor vehicle has a gross weight rating of 10,001 or more pounds ..." 49 C.F.R. § 390.5. UPS considers driving commercial motor vehicles an essential function of Murphy's job as mechanic. As a mechanic, Murphy drove UPS vehicles with gross weight ratings of 10,001 or more pounds. Murphy and other UPS mechanics were expected and required to drive tractor trailers and package cars. A tractor trailer has a gross weight rating of 55,000 pounds, while a package car has a gross weight rating of 12,000 to 20,000 pounds.

Murphy and other UPS mechanics were expected and required to drive tractor trailers and package cars to perform "road tests" and "road calls." During a "road test," a mechanic takes the vehicle being repairing out on the road to diagnose the problem or determine if the previously diagnosed problem has been fixed. During a "road call," a mechanic has to deliver an operating vehicle to a driver whose package car has broken down, fix the broken vehicle, and drive it back to the facility. Sometimes packages on board were traveling in interstate commerce.

During the five weeks that Murphy worked for UPS, he performed road tests on UPS vehicles between 12 and 18 times. Because he worked the night shift, Murphy's driving of commercial vehicles would primarily be performing road calls on tractor trailers and road tests on package cars. All of the vehicles which Murphy worked were commercial motor vehicles. At times, Murphy was the

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only mechanic on duty in Topeka and was the only employee available to perform road tests or road calls. UPS expected Murphy and other mechanics to be able to drive commercial motor vehicles on every shift they worked.

DOT Regulations require that a driver of a commercial motor vehicle must be "physically qualified" and have a medical examiner's certificate. With respect to high blood pressure the regulations provide as follows:

(a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and ... has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

(b) A person is physically qualified to drive a commercial motor vehicle if that person ...

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.

49 C.F.R. § 391.41.

In September, 1988, the DOT issued the *Medical Regulatory Criteria for Evaluation [of High Blood Pressure] Under Section 391.41 (b)(6)*, which address the question under Section 391.41(b)(6) of whether an individual has a current clinical diagnosis of high blood pressure that is likely to interfere with a driver's ability to operate a motor vehicle and when further tests may be necessary.

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The *DOT Medical Regulatory Criteria for Evaluation* provides that in order to be physically qualified to drive a commercial motor vehicle, other than a temporary three-month certification for evaluation and treatment of mild hypertension (from 161/91 to 180/104), an individual must maintain blood pressure less than or equal to 160/90.

Murphy's blood pressure at all relevant times was above the 160/90 standard established in the *DOT Medical Regulatory Criteria for Evaluation*. Murphy's treating physician testified that Murphy will never be able to qualify for a job that requires a blood pressure reading of 160/90 or below. Murphy is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep and irritability. Murphy's treating physician testified that Murphy "would not be able to function" if he took medication to get his blood pressure below 160/90.

UPS requires all mechanics to take a DOT physical and secure a DOT health card prior to starting work. Other than his position at UPS, Murphy has never been required to obtain DOT certification for any other job.

On August 16, 1994, took his physical for his DOT exam. Murphy's blood pressure was 186/124. Despite his elevated blood pressure, Murphy was issued a DOT health card by the testing clinic. Based upon his high blood pressure, Murphy should have been disqualified on his initial exam and not issued a DOT health card. On September 15, 1994, while reviewing medical records, the UPS Medical Supervisor discovered that Murphy's blood pressure was above the DOT standard and that his DOT health card had been issued in error. On September 26, 1994,

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Murphy's blood pressure was tested again but was still above the DOT standard of 160/90.

On October 5, 1994, UPS terminated Murphy's employment. Murphy did not request any accommodations other than requesting a waiver and additional time to get his blood pressure within the DOT standards. Approximately two to three weeks after his termination by UPS, Murphy has secured another mechanic job with Car Clinic. In his position with Car Clinic, Murphy was not required to obtain DOT certification. Murphy currently remains employed at Car Clinic.

ADA

"Enacted in 1990, the ADA is designed to level the playing field for the more than 43,000,000 Americans who have one or more physical or mental disabilities." *Schmidt v. Methodist Hospital of Indiana, Inc.*, 89 F.3d 342, 344 (7th Cir. 1996). "The ADA and its attendant regulations were enacted, in part, to address perceived inadequacies in the Rehabilitation Act of 1973, 29 U.S.C. § 794." *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 387 (N.D. Iowa 1995). In its findings, Congress concluded that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress also found that "individuals with disabilities continually encounter various forms of discrimination," 42 U.S.C. § 12101(a)(5). One of the purposes of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). See *Hutchinson*, 883 F. Supp. at 390 (thoroughly discussing the history of the ADA).

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However, "[t]he ADA is not a job insurance policy, but rather a congressional scheme for correcting legitimate inequities the disabled face." *Hedberg*, 47 *Id.* at 934. "The ADA became effective on July 26, 1992, and it does not apply retroactively." *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 557 (D. Kan. 1995).

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." 42 U.S.C. 2112(a). "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "The term 'disability' means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

"To maintain a claim for wrongful discharge under the ADA, a plaintiff must demonstrate (1) that she is a disabled person within the meaning of the ADA; (2) that she is able to perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer terminated her because of her inability." *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1173 (10th Cir. 1996). See *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1996) ("Accordingly, to qualify for relief under the ADA, a plaintiff must establish (1) that he is a disabled person within the meaning of the ADA; (2) that he is

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qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability."); *Milton v. Scrivner, Inc.* 53 F.3d 1118, 1123 (10th Cir. 1995).

"The ADA does not define the term 'major life activities' " as used in 42 U.S.C. § 12102(2)(A). However, "[t]he ADA regulations adopt the definition of 'major life activities' found in the Rehabilitation Act regulations, 34 C.F.R. § 104." *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994), *cert. denied* 115 S. Ct. 1104 (1995). "The term means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* (quoting 29 C.F.R. § 1630.2(i)).

To demonstrate that an impairment "substantially limits" the major life activity of working, an individual must show "significant[] restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* 1630.2(j)(3)(i) (emphasis added). The regulations specify that "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

Bolton, 36 F.2d at 942. See *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996).

The Tenth Circuit "has endorsed a two-part analysis for determining whether a person is qualified under the ADA:

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First, we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, he must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

Milton, 53 F.3d at 1123 (quoting, *White*, 45 F.3d at 361-62) (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993), cert denied, 114 S. Ct. 1386 (1994))).

Under the ADA the term "discriminate" includes an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). See *Lowe*, 887 F.3d at 1174. "It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Vande Zande v. States of Wis. Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995)

The term "reasonable accommodation" may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

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(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

Burden of Proof under the ADA

"Plaintiff has the burden to establish that he is 'disabled' and 'qualified' to perform the essential functions of the job either with or without reasonable accommodation." *Dutton v. Johnson County Bd. of County Comm'rs* 859 F. Supp. 498, 504 (D. Kan. 1994); see *Tyndall v. National Educ. Centers*, 31 F.3d 209, 213 (4th Cir. 1994) ("Plaintiff bears the burden of demonstrating that she could perform the essential functions of her job with reasonable accommodation.").

Once the plaintiff produces evidence sufficient to make a facial showing that accommodation is possible, the burden of production shifts to the employer to present evidence of its inability to accommodate. (citations omitted). If the employer presents such evidence, the plaintiff may not simply rest on his pleadings. He "has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence." *Prewitt v. United States Postal Serv.*, 662 F.2d 292,

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308 (5th Cir. Unit A 1981); see *Mason*, 32 F.3d at 318; *Chiari City of League City*, 920 F.2d 311, 318 (5th Cir. 1991). As with discrimination cases generally, the plaintiff at all times bears the ultimate burden of persuading the trier of fact that he has been the victim of illegal discrimination based on his disability. See *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747-49 (1994) (citations omitted).

White, 45 F.2d at 361.

Analysis

Has Murphy demonstrated that he has disability within the meaning of the ADA?

UPS contends Murphy's medicated blood pressure is not a disability within the meaning of the ADA. Although Murphy's hypertension precludes him from certain strenuous activities, UPS argues that his condition is not of such a degree that it substantially effects one or more major life activities. UPS contends that the minor inconveniences caused by Murphy's hypertension are insufficient to establish the existence of a disability.

Murphy responds, arguing that his hypertension is clearly a disability within the meaning of the ADA. Murphy contends that his condition fits each of the factors set forth in 29 C.F.R. § 1630.2(j) for determining the existence of a disability. Based upon the nature and severity of his hypertension, the duration and expected duration of the impairment, the permanent or long term impact on a person, and the work limitations his condition causes. In some detail, Murphy describes the consequences,

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some of them dire such as a heart attack or a stroke, which may result from high blood pressure. Murphy also contends that his condition should be judged by its unmedicated state.

In his response, UPS argues that Murphy is trying to have it both ways. To demonstrate that he is disabled, Murphy sets forth several of the serious consequences which can result from his high blood pressure. Then in a subsequent section of his brief, Murphy, in an effort to demonstrate that he is qualified for the position with UPS, essentially argues that his high blood pressure posed no threat or obstacle to the performance of his duties as mechanic. UPS argues that Murphy should not be permitted to withstand summary judgment based upon such inconsistent positions. UPS contends that illnesses effectively controlled by medication do not constitute a "disability" under the ADA.

Medicated or Non-Medicated State

Murphy's contention that his disability should be evaluated in its unmedicated state is based primarily on the EEOC's Interpretative Guidance, Section 1630.2(j),² which states in pertinent part:

2. The EEOC published as an appendix to the regulations a section-by-section "Interpretive Guidance on Title I of the Americans with Disabilities Act." 29 C.F.R. Pt. 1630, App. We have looked to this source in interpreting the ADA. See *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12, 16 (1st Cir. 1994). Such administrative interpretations of the Act by the enforcing agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for

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An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

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guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986).

Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 672 (1st Cir. 1995).

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The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. Pt. 1630, App. § 1630.2(j). However, in a subsequent section of those same guidelines, Section 1630.2(1), titled "Regarded as Substantially limited in a Major Life Activity," the EEOC opines:

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

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(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29. An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

This section appears to be at odds with interpretative guidelines found in § 1630.2(j). Under § 1630.2(j) of the EEOC's interpretive guidelines, a person's unmedicated high blood pressure would constitute a disability. Yet, the interpretative guidelines in § 1630.2(1) implicitly suggest that a person who has controlled his blood pressure by medication does not have a disability; if this were not so, why would a person suffering from high blood ever have to look to the "regarded as" section of the ADA to prove the existence of a disability? The apparent tension between the two sections of the EEOC's interpretive guidelines is not easily resolved.

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In any event, although some courts have expressly or implicitly apparently followed the EEOC's interpretative guideline § 1630.2(j), *see, e.g., Sarsycki v. United Parcel Service*, 862 F. Supp. 336, 340 (W. D. Okla. 1994) (without insulin plaintiff would be unable to perform major life activities), several courts have explicitly or implicitly rejected the EEOC's Interpretative Guidance, finding that an illness effectively controlled by medication does not constitute a disability under the ADA. *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 n.3 (5th Cir. 1996) ("Arguably, on the other hand, had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity."); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993) (corrected vision not a disability); *Schluter v. Industrial Coils Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994) (EEOC's interpretive guidance directly at odds with clear statutory language of ADA requiring substantial limitation).

In rejecting the interpretation offered by the EEOC, the court in *Schluter* stated:

[T]he crucial determination becomes whether the EEOC guidance is correct that the disability inquiry should be made without regard to the ameliorative effects of medication. The EEOC's guidance is not binding on the court. *See, e.g., Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 812 (N.D. Tex. 1994) (EEOC guidance not a binding regulation but simply a statement of what the agency thinks the statute means). Recognizing this, plaintiff notes that the Court of

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Appeals for the Seventh Circuit has cited the EEOC's guidelines with approval in *Roth*, 57 F.3d at 1454. Plaintiff also cites several decisions in which courts have applied the EEOC guidelines and concluded that an insulin-dependent diabetic is disabled under the act. *Pater v. Deringer Manufacturing Co.*, 1995 WL 530655 at *4, 4 AD Cases 1840 (N.D. Ill. Sept. 7, 1995) (diabetic disabled because without medication diabetes is life-limiting); *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 340 (W.D. Okla. 1994) (without insulin plaintiff would be unable to perform major life functions).

Although agency interpretations are to be given deference, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), in this instance the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment "substantially limits" their lives. 42 U.S.C. § 12102(2)(A). See *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171, 109 S. Ct. 2854, 2863-64, 106 L. Ed. 2d 134 (1989) ("[O]f course no deference is due to agency interpretations at odds with the plain language of the statute itself.") insulin-dependent diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eyeglasses or contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eyeglasses is disabled in fact is to read out of the act's first definition of disability the requirement

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that it applies only to those persons who are "substantially limited" in major life activities.

928 F. Supp. at 1445.

This court joins other courts that have rejected this portion of § 1630.2(j) of the EEOC Interpretative Guidance. Because the plain language of the ADA conflicts with the EEOC's Interpretative Guidance, the court concludes that Murphy's impairment should be evaluated in its medicated state.

Having determined that Murphy's impairment should be evaluated in its medicated state, the court will now turn its attention to the issue of whether Murphy has presented sufficient evidence for a rational factfinder to conclude that his high blood pressure constitutes a disability under the ADA. In *Deghand v. Wal-Mart Stores, Inc.* 926 F. Supp. 1002 (D. Kan. 1996), this court considered the issue of whether a plaintiff's high blood pressure constituted a disability under the ADA. In *Deghand* the plaintiff claimed that her high blood pressure was a disability under the ADA. This court granted the defendant's motion for summary judgment, finding that

[t]he plaintiff has not come forth with any evidence, much less competent and unambiguous medical evidence, that her high blood pressure substantially limited any one or more of her major life activities. Not surprising, other courts too have found that similar disability claims lacked evidence and, therefore, have held that high blood pressure, by itself, typically is not a disability within the meaning of the Act. *Oswalt v. Sara Lee Corp.*, 889 F.Supp. 253, 257 (N.D. Miss. 1995) (citations omitted), *aff'd*, 74 F.3d 91 (5th Cir. 1996). The Fifth Circuit said:

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According to Oswalt, his physical impairment was his high blood pressure, and this impairment substantially limited a major life activity when his doctor authorized him to miss work while he adjusted to medication.

....

In this case, Oswalt has provided no evidence to show that either the high blood pressure or the alleged side effects from the medication substantially limited his job. We agree with the district court that "[h]igh blood pressure alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protections of the ADA." *Oswalt*, 889 F.Supp. at 258. We do not imply that high blood pressure in general can never be a "disability," as defined by the statute. We hold only that Oswalt failed to provide any evidence that his high blood pressure substantially limited a major life activity.

74 F.3d at 92. Like Oswalt, the plaintiff here wants the finding of disability based on nothing more than a physician's general diagnosis without any evidence that the plaintiff's condition substantially limited her

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work activity. In addition, the medical leave slips that Deghand submitted say simply that she is excused from work "to run tests" or "due to testing." (Dk. 44, Dep. Ex. 16 and 17). The slips, therefore, are not proof that the hypertension itself was the reason for Deghand's medical leave of absence rather than the temporary condition of testing or adjusting to medication. *See Oswalt v. Sara Lee Corp.*, 889 F.Supp. at 257. The defendant is entitled to summary judgment on this claim.

926 F. Supp. at 1013. *See Aucutt v. Six Flags Over Mid-America, Inc.* 85 F.3d 1311, 1319 (8th Cir. 1996) (plaintiff who failed to present any evidence indicating that his angina, high blood pressure, and coronary artery disease placed a significant restriction on his ability to perform any of the basic functions enumerated in 29 U.S.C. § 1630.2(i) not disabled with the meaning of 42 U.S.C. § 12102(2)(A)).

Based upon the evidence presented, the court finds that a rational factfinder would be unable to conclude that Murphy's high blood pressure constitutes a disability under § 12102(2)(A). The dearth of medical evidence supporting his disability claim coupled with intermittent effects personally attributed by Murphy to his high blood pressure is insufficient to establish the existence of a disability. The only limitation specifically set by Murphy's treating physician — the 200 pound lifting restriction — is not of such a nature as to significantly restrict him in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. In short, Murphy's high blood pressure and its concomitant effects do not constitute a disability under the ADA. *See Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996)

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(disqualification from narrow range of jobs involving routine exposure to extreme trauma — such as a firefighter — does constitute a disability under the ADA); *Woolen v. Farmland Industries*, 58 F.3d 382, 384 (8th Cir. 1995) (medical restrictions of “light duty — no work with meat products--no work in cold environment — lifting 10 lbs. frequently 20 lbs. maximum” insufficient to establish that plaintiff was disabled within the meaning of the ADA); *Hamm v. Runyon*, 51 F.3d 721, 725 (7th Cir. 1995) (“Under the ADA, ‘intermittent, episodic impairments are not disabilities.’ ”) (quoting *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995); *Stone v. CGS Distribution, Inc.*, 52 F.3d 333 (10th Cir. 1995) (Table); *Bolton*, 36 F.3d at 942-44 (impairments including pain, numbness and limited ability to lift weight (no lifting of objects larger than 50 pounds overhead) did not show that plaintiff was restricted from performing a class of jobs).

Even if Murphy was not disabled, did UPS nevertheless regard Murphy as Disabled?

Murphy contends that even if he is not disabled, UPS regarded him as such, and therefore under 42 U.S.C. § 12102(2)(C) he still presents a viable ADA claim. UPS responds, arguing that it did not regard Murphy as disabled but only that he was not certifiable under DOT regulations. As discussed below, the court concludes UPS did not regard Murphy as disabled, only that he was not certifiable under DOT regulations. See *Campbell v. Federal Exp. Corp.*, 918 F. Supp. 912, 920 n.10 (D. Md. 1996) (“As a matter of law, Federal Express has neither ‘relied on a record’ of Campbell’s medical history, nor did Federal Express ‘regard’ Campbell as ‘disabled’; it regarded him as not certifiable under DOT regulations.”).

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Although the court could end its analysis here, the court will briefly address the other issues raised by the parties.

Was Murphy a “qualified individual” within the meaning of the ADA?

UPS contends that Murphy was not a qualified individual for the mechanic position due to his high blood pressure. Murphy to suggest that he was qualified for the mechanic position and that driving a commercial vehicle was not an essential function of the job. Murphy also suggests that most of his driving would have simply been a spin around the block and that UPS should have let him continue to drive in the capacity of mechanic, despite the fact that he was erroneously certified. Murphy also contends that he did possess a DOT certification card and therefore he was qualified for the UPS position. Murphy contends that UPS should have assigned the driving functions to another employee.

Essential Functions of the Job

“The initial inquiry in determining whether a job requisite is essential is whether an employer actually requires all employees in the particular position to perform the allegedly essential function.” *Milton*, 53 F.3d at 1124 (citing 29 C.F.R. Pt. 1630, App. § 1630.2(n)). “An employer’s judgment is also relevant evidence to be considered, as are the terms of any collective bargaining agreement.” *Id.* “This inquiry is not intended to second guess the employer or to require him or her to lower company standards.” *Id.*

Murphy’s attempts to demonstrate that driving the trucks was not an essential function are unavailing. The court is satisfied that no rational factfinder could conclude that driving the vehicles

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during both road tests or road calls was not an essential function of the mechanic's job at UPS. It takes no stretch of the imagination to believe that a mechanic would be expected to check the efficacy of his repairs. One would generally expect a mechanic who has made repairs to the brakes of a commercial vehicle would road test his work product before returning the vehicle to the UPS delivery fleet. Similarly, delivering working and retrieving disabled vehicles does not strike the court as an aberrant expectation of an employer such as UPS.

As to Murphy's suggestion that the essential function of driving the commercial vehicles should have been assigned to another employee, the ADA does not impose that obligation upon employers. *See, Milton*, 53 F.3d at 1124 ("An employer is not required by the ADA to reallocate job duties in order to change the essential function of a job. *See* 29 C.F.R. Pt. 1630 App. 1630.2(o); *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991). An accommodation that would result in other employees having to work (sic) harder or longer hours is not required."); 29 C.F.R. Pt. 1630, App. 1630.2(o) ("It should be noted that an employer is not required to promote an individual with a disability as an accommodation."); *Rhodes v. Bob Florence Contractor, Inc.*, 890 F. Supp. 960, 967 (D. Han. 1995).

Acceptance of Murphy's alternative argument — that UPS should have simply allowed him to continue driving on the erroneously issued DOT certification — would set a dangerous precedent. Once UPS learned that Murphy's DOT certification had been issued in error, it could not simply overlook that fact. Placing an uncertified person behind the wheel of one of its vehicles would have potentially exposed UPS to civil and criminal liability. *See Chandler*, 2 F.3d at 1395 ("Woe unto the employer who put such an employee behind the wheel of a vehicle

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owned by the employer which was involved in a vehicular accident."). The ADA does not require an employer to accommodate a person's disability by ignoring other duties imposed by law. Nor has Murphy refuted UPS' contention that there are no provisions for obtaining a waiver of the DOT blood pressure standards.

To the extent that Murphy suggests that UPS should have given him an indefinite amount of time to lower his blood pressure, the ADA apparently imposes no such obligation on an employer. *See Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("Nothing the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect."). Moreover, the uncontroverted facts demonstrate that at the present time and for the foreseeable future there is no way for Murphy to function if his blood pressure is lowered to the level required by the DOT standards. UPS was not required to retain Murphy on the slim prospect that his lifelong condition might someday in the distant future be controlled.

Is UPS' compliance with DOT regulations a complete defense?

UPS contends that its compliance with DOT regulations is a complete defense to Murphy's ADA discrimination claim. In support of that contention, UPS cites *Campbell v. Federal Exp. Corp.*, 918 F. Supp. 912 (D. Md. 1996). In pertinent part, the court in *Campbell* stated:

It is undisputed that Federal Express may rely on DOT regulations as a defense to an ADA discrimination claim. The regulations implementing the ADA provide:

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If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a pretext, or by showing that the Federal standard did not require the [alleged] discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with [the ADA].

29 C.F.R.App. § 1630.15(e). Moreover, the legislative history of the ADA includes the following admonishment from Congress:

With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job related and consistent with business necessity in order to be considered a qualified individual with a disability under Title I of this legislation.

H.R.Rep. No. 101-485(II), 101st Cong., 2d Sess. 57 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 339. Thus, it is plain that in the absence of a showing of

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pretext, and provided the DOT certification is "job related" and consistent with "business necessity," Campbell's failure to obtain the required DOT certification is a complete defense to his claim.

918 F. Supp. at 917. Because there is no evidence demonstrating that UPS' reliance on the DOT regulations was pretextual, and because the qualification standard was clearly job related, UPS' reliance on the DOT regulations is a defense to Murphy's ADA claims.

Assuming, arguendo, that compliance with DOT regulations is not a complete defense, was there a reasonable accommodation that would have enable Murphy to perform the essential functions of the job?

Even if UPS' obligation to comply with DOT regulations was not a complete defense to Murphy's ADA claim, Murphy has not sufficiently refuted UPS' evidence that his continued employment would have been an undue hardship on UPS.

IT IS THEREFORE ORDERED that UPS' motion for summary judgment (Dk. 39) is granted. The clerk of the court shall enter judgment in favor of the defendant UPS.

Dated this 22nd day of October, 1996, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Judge

APPENDIX C — STATUTES INVOLVED

The Americans With Disabilities Act

SEC. 2. FINDINGS AND PURPOSES. 42USC 12101.

(a) Findings. The Congress finds that

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and

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relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy and inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

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(2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3 DEFINITIONS*42USC 12102*

As used in this act:

...

(2) Disability. The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

*Appendix C***SEC. 102. DISCRIMINATION.***42USC 12112*

(a) General Rule. No Covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

APPENDIX D — EEOC REGULATIONS AND INTERPRETATIVE GUIDANCE

The Americans with Disabilities Act

EEOC REGULATIONS AND INTERPRETATIVE GUIDE

29 C.F.R. § 1630.2(h)

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; . . .

29 C.F.R. § 1630.2(j)

(j) *Substantially limits.* —

(1) The term “substantially limits” means:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

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(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of “working” —

(i) The term “substantially limits” means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working;”

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills and abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

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(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(1)

(1) *Is regarded as having such an impairment means:*

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

Interpretive Guidance

Section 1630.2(h) Physical or Mental Impairment

...

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23; House Labor Report at 52; House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by

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medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

Interpretive Guidance

Section 1630.2(j) Substantially Limits

...

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.

...

Similarly, a *diabetic* who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52.

...

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

*Appendix D***Interpretive Guidance****Section 1630.2(1) Regarded as Substantially Limited in
a Major Life Activity**

...

For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubmitted fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

**APPENDIX E — DEPARTMENT OF
TRANSPORTATION REGULATION****DEPARTMENT OF TRANSPORTATION REGULATION****49 C.F.R. § 391.41****§ 391.41 Physical qualifications for drivers.**

...

(b) A person is physically qualified to drive a motor vehicle if that person —

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a motor vehicle safely;

* * *



No. 97-1992

Supreme Court, U. S.

FILED

JUL 27 1998

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1997

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Americans with Disabilities Act ("ADA") defines "disability" under 42 U.S.C. § 12102(2)(A) as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." Petitioner is an employee with the physical impairment of high blood pressure that, due to successful treatment with medication, does not substantially limit any major life activity.

The first question presented by Petitioner is whether, as the Court of Appeals held, the definition of "disability" under the ADA requires an assessment of whether Petitioner's actual limitations caused by his impairment as controlled by medication are sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity; or, as Petitioner argues, the ADA requires an assessment of what hypothetical limitations the Petitioner (and the tens of millions of other Americans with impairments controlled by medication or assistive devices such as eyeglasses) would suffer without medication and whether those hypothetical limitations would be sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity.

Respondent UPS agrees with Petitioner that certiorari is appropriate on this question. There currently is a significant split of authority in the circuits, which places a national employer such as UPS in the position of attempting to comply with different legal standards depending on geographic location. The problem is illustrated by the opposite holdings on the issue rendered by the Tenth Circuit in this case and the First Circuit in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998).

2. Petitioner's second question should be disregarded because it was not addressed by the Court of Appeals; however, the appropriate question would be whether the District Court properly granted summary judgment based on the alternative ground that Respondent's compliance with Department of Transportation ("DOT") safety regulations regarding high blood pressure is a complete defense to this ADA claim?

3. Petitioner's third question should be disregarded because it was not addressed by the Court of Appeals; however, the appropriate question would be whether the District Court properly granted summary judgment based on the alternative ground that, if one assumed Petitioner had an ADA disability, he was not a "qualified individual with a disability" because he could not satisfy DOT blood pressure regulations and there was no reasonable accommodation that would allow him to perform his job?

4. Petitioner's fourth question raises only the issue of whether the evidence posed a material fact dispute; however, the appropriate question would be whether the District Court properly granted summary judgment based on the ground that Respondent discharged Petitioner because his high blood pressure precluded certification under DOT regulations, not because he was regarded as having a disability.

STATEMENT PURSUANT TO RULE 29.6

Respondent is United Parcel Service, Inc. Respondent's parent corporation is United Parcel Service of America, Inc. Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

In August 1994, Petitioner was hired by Respondent United Parcel Service ("Respondent" or "UPS") as a mechanic at a facility in Topeka, Kansas. In compliance with U.S. Department of Transportation ("DOT") regulations, and because UPS mechanics drive commercial motor vehicles, UPS requires all mechanics to take a DOT physical and secure a valid DOT health card prior to starting work.

DOT regulations and medical regulatory criteria require that an individual must maintain blood pressure less than or equal to 160/90 in order to be physically qualified to drive a commercial motor vehicle (other than a temporary three-month certification for evaluation and treatment of mild hypertension, which is defined as from 161/91 to 180/104). The parties in the case stipulated that Petitioner's blood pressure at all relevant times was above the 160/90 standard established by the DOT.

On August 16, 1994, when Petitioner took his DOT physical, his blood pressure was 186/124, far above the DOT standard of 160/90. The testing clinic erroneously issued Petitioner a DOT health card. In his STATEMENT OF THE CASE, Petitioner inaccurately states that "He passed the [DOT] test." Petitioner actually failed the DOT test with his blood pressure of 186/124.

Petitioner commenced work based on the erroneous DOT health card. On September 15, 1994, while reviewing medical records, the Medical Services Supervisor for Respondent discovered that Petitioner's blood pressure was above the DOT standard and that his DOT health card had been issued in error. On September 26, 1994, Petitioner's blood pressure was retested twice and his blood pressure readings were 160/102 and 164/104, still above the DOT standard of 160/90. Petitioner

was terminated on or about October 5, 1994, because of his inability to meet DOT requirements.

While Petitioner cannot meet DOT blood pressure requirements, with the help of medication, he suffers virtually no limitations resulting from his hypertension. He has worked in the physically demanding job of mechanic (in positions that did not require DOT certification) for more than 22 years without experiencing any difficulties due to his hypertension. No doctor has ever placed any limitation on Petitioner because of his hypertension. Petitioner's treating physician testified that Petitioner "functions normally doing everyday activity that an everyday person does."

Petitioner alleges that Respondent discriminated against him on the basis of his alleged disability, hypertension, when it terminated his employment as a mechanic due to his failure to satisfy the DOT blood pressure requirements. Petitioner contends that Respondent should have allowed him to continue driving commercial motor vehicles even though he was not certifiable under DOT regulations.

The District Court granted Respondent's Motion for Summary Judgment on October 22, 1996, on the following grounds: (1) Petitioner failed to establish a genuine issue of material fact on the question of whether his high blood pressure/hypertension constitutes a "disability" under the ADA; (2) Petitioner failed to establish a genuine issue of material fact on the question of whether, even if he did not have an actual disability under the ADA, he was "regarded as" having a "disability" under the ADA; (3) Petitioner failed to establish a genuine issue of material fact on the question of whether, assuming he had a "disability" under the ADA, he was a "qualified individual with a disability" under the ADA; (4) Petitioner failed to establish a genuine issue of material fact

on the question of whether there was a reasonable accommodation that would have enabled him to perform the essential functions of the job he held with Respondent; and (5) Respondent's compliance with DOT safety regulations' physical standards for persons driving commercial vehicles is a complete defense to Petitioner's ADA claim. Petitioner appealed the District Court's decision to the Tenth Circuit Court of Appeals on November 20, 1996. On March 11, 1998, the Tenth Circuit affirmed the District Court's decision on grounds 1 and 2 and declined to consider the other grounds as moot.

ARGUMENT

I.

RESPONDENT UPS AGREES THAT CERTIORARI IS APPROPRIATE WITH RESPECT TO THE FIRST QUESTION RAISED BY PETITIONER REGARDING WHETHER THE ADA DEFINITION OF DISABILITY REQUIRES THE ASSESSMENT OF AN IMPAIRMENT IN A MEDICATED STATE OR IN A HYPOTHETICAL UNMEDICATED STATE.

Respondent UPS agrees with Petitioner that certiorari is appropriate on the first question presented by Petitioner, but not on any other questions. The proper description of the first question is whether, as the Court of Appeals held, the definition of "disability" under the ADA requires an assessment of whether Petitioner's actual limitations caused by his impairment as controlled by medication are sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity; or, as Petitioner argues, the ADA requires an assessment of what hypothetical limitations the Petitioner (and the tens of millions of other Americans with impairments controlled by medication or assistive devices such as eyeglasses)

would suffer without medication and whether those hypothetical limitations would be sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity.

There currently is a significant split of authority in the circuits on this question, which places a national employer such as UPS in the position of attempting to comply with different legal standards depending on geographic location. The problem is illustrated by the opposite holdings rendered in two UPS cases — the Tenth Circuit in this case and the First Circuit in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998).

Six Courts of Appeals' decisions have discussed and decided the issue, with four in favor of Petitioner and two in favor of Respondent. Three other circuits have cited EEOC interpretative guidance that favors Petitioner's position, without discussion of the underlying issue. Respondent submits that this Court should grant certiorari on the "medicated" issue and provide uniform application of the ADA across the country.

The Tenth and Sixth Circuits have held, consistent with the Respondent's position in this case, that the ADA statutory definition requires an assessment of limitations after medication or assistive devices. *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) ("In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures."); *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Judge Kennedy wrote in his concurring opinion:¹ "The ADA does

1. Two of the three judges on the panel concluded in concurring opinions that the existence of a disability should be determined after medication, while the opinion in the case was written by the single judge on the panel who concluded that disability should be determined on an unmedicated basis.

not provide protection for anyone with any degree of physical or mental impairment: It provides protection only for those whose impairments substantially limit their lives. I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication.") The Fifth Circuit also expressed agreement, albeit in dicta. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-92, n.3 (5th Cir. 1996) ("... had Congress intended that substantial limitation be determined without regard to mitigating measures [such as medication], it would have provided for coverage under § 12101(2)(A) for impairments that have the potential to substantially limit a major life activity."). See also *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 ("... EEOC Interpretative Guideline ... is in direct conflict with the ADA's express statutory language ..."); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994) (EEOC's "interpretive gloss" is "at odds with clear statutory language"); *Ferguson v. Western Carolina Regional Sewer Authority*, 914 F. Supp. 1297, 1299 (D.S.C.), *aff'd*, 104 F.3d 358 (4th Cir. 1996) ("[T]he determination of whether an individual has a disability should be based not on the diagnosis of the impairment, but on the effect of the impairment on the life of the individual." citing 29 C.F.R. 1630.2(j)).

Four circuits have discussed the issue and ruled in favor of the position advocated by Petitioner. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998); *Matczak v. Frankford Candy and Chocolate Company*, 136 F.3d 933 (3rd Cir. 1997); *Baert v. Euclid Beverage, Limited*, 1998 U.S. App. LEXIS 15293 (7th Cir.), and *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996). Three other circuits, which Petitioner characterizes as having "upheld" the EEOC position, simply cited EEOC interpretative guidance that favors Petitioner's position, without discussion of the underlying issue. *Foreman*

v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1050, 140 L. Ed. 2d 113; *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 693, 139 L. Ed. 2d 638; and *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1349, 137 L. Ed. 2d 506.

In view of this significant split of authority in the circuits, the question of whether the ADA requires an analysis of conditions in their medicated or unmedicated state is a clear question of statutory construction that needs to be resolved by this Court.

II.

THE TENTH CIRCUIT CORRECTLY HELD THAT RESPONDENT'S HIGH BLOOD PRESSURE MUST BE VIEWED IN ITS MEDICATED STATE AS OPPOSED TO A HYPOTHETICAL UNMEDICATED STATE TO DETERMINE WHETHER HE HAS A DISABILITY UNDER THE ADA.

Petitioner's high blood pressure is controlled by medication. He has worked successfully for 22 years as a mechanic for other employers in jobs that did not require the driving of commercial motor vehicles and DOT certification. He lives a normal life with virtually no restrictions.

The Tenth Circuit in this case correctly held that the ADA definition of disability required an assessment of whether Petitioner's actual limitations caused by hypertension, as controlled by medication, were sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity. The court properly rejected Petitioner's argument that the ADA requires speculation about what hypothetical

limitations he would suffer without medication and whether those hypothetical limitations would be sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity.

Petitioner's argument is contrary to clear statutory language requiring an "impairment that substantially limits one or more major life activities," not an impairment that potentially or hypothetically limits a major life activity. The extraordinarily broad view of "disability" advocated by Petitioner was illustrated at oral argument in this case at the Court of Appeals. Petitioner and Amici EEOC argued that every person who needs eye glasses has a disability under the ADA.

In *Bragdon v. Abbott*, 1998 U.S. LEXIS 4212, where this Court held that HIV was a disability under the ADA, inherent in the Court's holding was that the statute requires an actual limitation of a major life activity, not a hypothetical limitation which may be suffered. The Court stated, "[t]he [ADA] is not operative, and the definition [of a disability] not satisfied, unless the impairment affects a major life activity." *Id.* at *23-*24.

Consistent with *Bragdon*, the Tenth Circuit in this case held that the ADA definition of disability was not satisfied because, with Petitioner's high blood pressure controlled by medication, the condition did not substantially limit a major life activity. This holding is mandated by the clear language of the ADA definition of disability.

Section 12102(2)(A) defines "disability" as "a physical or mental impairment that *substantially limits* one or more of the major life activities of such individual." (*emphasis added*) It does not define disability as an impairment that "potentially" limits a major life activity or an impairment that would, absent medication, limit a major life activity. Petitioner seeks to have

this Court make such a change in the statutory language. Such a re-writing of the ADA would require, in this case and thousands of other cases, that trial courts and juries engage in speculation about what limitations would hypothetically exist in the absence of medication or assistive devices, and determine whether those hypothetical limitations meet the statutory requirement that the "impairment substantially limit one or more major life activities."

Such an excursion into the hypothetical world is contrary to statutory language of Section 12102(2)(A). It also is unnecessary to protect persons such as Petitioner with an impairment that does not limit a major life activity, but who might still be subject to discrimination based on stereotypical myths regarding the impairment.

Congress already has provided that protection in a separate section of the ADA definition of disability that covers persons "regarded as" having a disability. See 42 U.S.C. § 12102(2)(C). The "regarded as" provision of the ADA is designed to "combat the effects of 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) This protection under the "regarded as" provision would apply to such discrimination against Petitioner because of his hypertension and against other persons with a broad range of impairments that do not substantially limit a major life activity. In this case, as properly held by the Tenth Circuit, Petitioner did not fall within the "regarded as" provision because UPS' action was based on clear DOT regulatory requirements, not any archaic attitudes, myths or erroneous perception about hypertension.²

2. The Petition for Certiorari does not challenge the Tenth Circuit's legal analysis on this issue; it only raises the question of whether there was a genuine issue of material fact on the issue. (Question 4).

Because the "regarded as" provision of Section 12102(2)(C) protects employees with impairments that do not substantially limit a major life activity, but who still might be discriminated against because of their impairment, there is no need to misinterpret the language of Section 12102(2)(A) requiring an "impairment that substantially limits one or more major life activities."

Such a misinterpretation of Section 12102(2)(A) would result in literally millions of Americans having an ADA disability, even though they suffer no limitation of a major life activity. For example, it is estimated that approximately 50 million Americans (20% of the country's population) suffer from hypertension. (Source: The American Heart Association) Under Petitioner's argument, these 50 million Americans would each have a "disability" under the ADA. This would just be the tip of the iceberg of statutory expansion because there are many other similar health conditions that are often effectively controlled by medication — asthma, allergies, depression, ulcers, vision impairments, arthritis, and diabetes. The definition of "disability," according to Petitioner, would extend to millions of Americans with a variety of illnesses or injuries who, with the aid of medication or other corrective measures, lead active, healthy, and unrestricted lives.

There is no statutory basis, or need, for Petitioner's proposed expansion of the definition of "disability." If a health condition is not controlled by medication and it actually substantially limits a major life activity, the individual should be protected against discrimination and is protected because his condition falls within the definition of "disability" under § 12102(2)(A). If an individual's health condition is controlled by medication, but an employer still "regards" the employee as having a disability based on stereotype, myth or bias, the employee should be protected against discrimination and is protected under the

"regarded as" disabled provision of § 12102(2)(C). The purpose of the ADA is to protect individuals who suffer real limitations or who are victims of biased perceptions of limitation, not to promote federal court litigation by extending coverage to every individual with a health condition that could hypothetically limit a major life activity.

A thorough discussion of how the EEOC interpretive guidance (and Petitioner's argument in this case) is in direct conflict with the statutory language of the ADA is set forth in *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996):

[T]he crucial determination becomes whether the EEOC guidance is correct that the disability inquiry should be made without regard to the ameliorative effects of medication. The EEOC's guidance is not binding on the court. *See, e.g. Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 812 (N.D. Tex. 1994) (EEOC guidance not a binding regulation but simply a statement of what the agency thinks the statute means). Recognizing this, plaintiff notes that the Court of Appeals for the Seventh Circuit has cited the EEOC's guidelines with approval in *Roth*, 57 F.3d at 1454. Plaintiff also cites several decisions in which courts have applied the EEOC guidelines and concluded that an insulin-dependent diabetic is disabled under the act. *Pater v. Deringer Manufacturing Co.*, 1995 WL 530655 at *4, 4 AD Cases 1840 (N.D. Ill. Sept. 7, 1995) (diabetic disabled because without medication diabetes is life-limiting; *Sarsycki v. United Parcel Service*, 862 F. Supp. 336, 340 (W.D. Okla. 1994) (without insulin plaintiff would be unable to perform major life functions).

Although agency interpretations are to be given deference, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), in this instance the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment "substantially limits" their lives. 42 U.S.C. § 12102(2)(A). *See Public Employees Retirement System v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863-64, 106 L. Ed. 2d 134 (1989) ("[O]f course no deference is due to agency interpretations at odds with the plain language of the statute itself.") If an insulin-dependent diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eyeglasses or contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eyeglasses is disabled in fact is to read out of the act's first definition of disability the requirement that it applies only to those persons who are "substantially limited" in major life activities.

III.

CERTIORARI SHOULD NOT BE GRANTED BASED UPON PETITIONER'S ARGUMENTS REGARDING ISSUES NOT ADDRESSED BY THE COURT OF APPEALS.

Petitioner raises two issues that were not addressed by the Court of Appeals — whether UPS' compliance with DOT regulations is a complete defense and whether Petitioner is a qualified individual for the mechanic position at issue. The general rule of this Court is that it "do[es] not address arguments

that were not the basis for the decision below." *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 369, n.5, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996). Also see *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . ."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). There is no reason for the Court to depart from this general rule in this case if certiorari is granted.

However, under any circumstances, certiorari should not be granted on the DOT issue because the District Court correctly held that compliance with DOT regulations is a complete defense to Petitioner's lawsuit. See *Campbell v. Federal Express Corporation*, 918 F. Supp. 912, 917 (D. Md. 1996). When the federal government imposes requirements on an employer through DOT safety regulations and the employer complies with those regulations, it should not be subject to ADA litigation by an employee dissatisfied with the result of the compliance with DOT regulations.

Certiorari also would not be appropriate under any circumstances on the other issue raised by Petitioner, but not addressed by the Tenth Circuit --- whether Petitioner was a "qualified individual" under the ADA. The ADA defines a "qualified individual with a disability" as:

[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8). Driving a commercial motor vehicle is an essential function of a UPS mechanic's position. Because Petitioner cannot satisfy the DOT safety standard on blood pressure, he is unable to perform the essential function for a UPS mechanic of driving a commercial motor vehicle. The parties stipulated that at all material times Petitioner's blood pressure was above the DOT safety standard. Additionally, there was no reasonable accommodation available that would permit Petitioner to perform the essential function of driving a commercial motor vehicle.

IV.

CERTIORARI SHOULD NOT BE GRANTED BASED ON PETITIONER'S ARGUMENT THAT THERE WAS A MATERIAL FACT DISPUTE ON THE QUESTION OF WHETHER RESPONDENT DISCHARGED PETITIONER BECAUSE HIS HIGH BLOOD PRESSURE PRECLUDED DOT CERTIFICATION OR BECAUSE HE WAS REGARDED AS DISABLED.

The final issue raised by Petitioner was addressed by the Court of Appeals, but presents no basis for certiorari because it is merely an evidentiary dispute over the existence of disputed material fact. The question is whether the District Court properly granted summary judgment based on the ground that Respondent discharged Petitioner because his high blood pressure precluded certification under DOT regulations, not because he was regarded as having a disability. The Tenth Circuit correctly affirmed the District Court and certiorari is not warranted on that holding.

CONCLUSION

The District Court and the Tenth Circuit Court of Appeals correctly decided this case. However, because of the significant split in the Circuits and the national implications of the "medicated versus unmedicated" issue, this Court should grant certiorari to resolve this conflict. The Petition for a Writ of Certiorari on all other issues should be denied.

Respectfully submitted,

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DEC 21 1998

Nos. 97-1943 and 97-1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON AND KIMBERLY HINTON, PETITIONERS

v.

UNITED AIR LINES, INC.

VAUGHN L. MURPHY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF FOR THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE**

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QUESTIONS PRESENTED

1. Whether the determination that a person has an actual disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12102(2)(A), must be made without regard to mitigating measures, such as medicines or prosthetic devices.

2. No. 97-1992 only: Whether an employer that terminates an employee solely because it believes the employee does not satisfy physical criteria established by a third party such as a government regulatory body could be found to have terminated the employee because the employee was "regarded as having" a disability within the meaning of 42 U.S.C. 12102(2)(C).

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**BRIEF FOR THE UNITED STATES AND THE
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AS AMICUS CURIAE**

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. *Sutton v. United Air Lines*. The district court dismissed the complaint filed by petitioners Karen Sutton and Kimberly Hinton, on the ground that it failed to state a claim on which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). The court of appeals affirmed.

a. The complaint alleged that petitioners, who are identical twin sisters, sought commercial pilot positions with respondent in 1992. Amended Compl. at 4. Petitioners alleged that they were regional airline pilots at the time, and that they amply satisfied the basic age, education, experience, and FAA certification qualifications for a pilot's job with respondent. *Id.* at 3. They claimed that respondent granted them interviews for pilot positions, but that respondent informed each of them at the time of the interview that their uncorrected vision did not comply with respondent's minimum requirements. *Id.* at 4, 6. Petitioners alleged that respondent "rejected [petitioners] on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability." *Id.* at 9.

With respect to the details of their vision, each petitioner alleged that her uncorrected eyesight is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but each petitioner also alleged that "[w]ith the use of corrective lenses, [she] has vision that is 20/20 or better." Amended Compl. at 6. They alleged that, without corrective lenses, each of them "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores." *Id.* at 7. They also alleged, however, that "[w]ith corrective measures, * * * [each of them] function[s] identically to individuals without a similar impairment." *Ibid.*

b. The district court ruled that petitioners had failed to state a claim upon which relief may be granted. 97-1943 Pet. App. A27-A37. Under the ADA:

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12102(2).

The district court first examined the existence of an actual limiting impairment under clause (A). The court noted that "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities," 97-1943 Pet. App. A32, and that petitioners therefore "have not stated a claim that they are substantially limited in the major life activity of seeing." *Id.* at A33. The court also held that petitioners' "common moderate vision impairment * * * does not substantially limit their ability to work within the meaning of the ADA." *Id.* at A34. In the court's view, "the ADA was intended to protect only a limited class of persons; specifically individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared." *Id.* at A35.

The district court also held that petitioners had failed to state a claim that respondent "regarded" them as disabled under clause (C) of the disability definition. The court stated that "[t]he statutory reference to a substantial limitation indicates that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." 97-1943 Pet. App. A36-A37. In the court's view, "[a]t

most, [petitioners] can establish that [respondent] regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at A37. The court added that petitioners "have had no difficulty obtaining other jobs in their field prior to this one." *Ibid.*

c. The court of appeals affirmed. 97-1943 Pet. App. A1-A25. Guided by the EEOC's regulatory definition of "impairment," under which "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices," 29 C.F.R. Pt. 1630 App. § 1630.2(h) para. 2, the court held that petitioners had adequately alleged that they suffered from an "impairment" of vision under the ADA. 97-1943 Pet. App. A9-A11. The court held, however, that "[t]he determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at A16. The court concluded that "while [petitioners'] uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing," they "can prove no set of facts upon which relief may be granted" because their vision is correctable. *Id.* at A17-A18.

The court also held that they had not set forth a claim upon which relief could be granted under the "regarded as" prong of the statute. The court stated that "in order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." 97-1943 Pet. App. A21. Although the court accepted as true petitioners' allegation

that they "were disqualified from 'all pilot positions' as they alleged in their Amended Complaint," the court nonetheless held that petitioners "cannot show disqualification from a 'class of jobs.'" *Id.* at A22.

2. *Murphy v. United Parcel Service, Inc.* The district court granted summary judgment to respondent on petitioner's claim under the ADA. The court of appeals affirmed.

a. Petitioner has had high blood pressure (hypertension) since he was ten years old. For 22 years, petitioner worked as a mechanic. Despite the fact that his blood pressure was very high (approximately 250/160, see 97-1992 Pet. App. 9a), it was controlled by medication. His own physician and respondent's physician both testified that, with medication, petitioner's "hypertension does not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do." *Id.* at 13a.

In August 1994, respondent hired petitioner as a mechanic—a job whose functions include driving commercial motor vehicles on "road tests" and "road calls," and which therefore requires satisfaction of Department of Transportation requirements. 97-1992 Pet. App. 14a. Among those requirements is that the driver of a commercial motor vehicle "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. 391.41(b)(6). The district court construed a subsequent DOT publication to provide that "in order to be physically qualified to drive a commercial motor vehicle * * *, an individual must maintain

blood pressure less than or equal to 160/90." 97-1992 Pet. App. 16a.¹

At the time he was hired, petitioner's blood pressure was measured as 186/124. 97-1992 Pet. App. 16a. In September 1994, respondent realized that petitioner had not satisfied the 160/90 standard, and petitioner was retested; his blood pressure was approximately 160/104. See 97-1992 Pet. 2. Petitioner's treating physician "testified that [petitioner] is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects." 97-1992 Pet. App. 16a. On October 5, 1994, respondent fired petitioner. *Id.* at 16a-17a.

b. The district court held that, for purposes of determining whether petitioner had shown that he had a disability, his "impairment should be evaluated in its medicated state." 97-1992 Pet. App. 29a. The court noted that "[t]he only limitation specifically set by [petitioner's] treating physician" was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 31a. The court stated that such a limitation "is not of such a nature as to significantly restrict him in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities," and that therefore petitioner's "high blood pressure and its concomitant effects do not constitute a disability under the ADA." *Ibid.* The court also concluded that "[respondent] did not regard [petitioner] as disabled, but only that he was not certifiable under DOT regulations." *Id.* at 32a. Finally, the district court concluded that petitioner was not qualified for the job,

¹ Both courts below misconstrued the import of the DOT regulations. See note 5, *infra*.

id. at 33a-35a, that in any event respondent's compliance with DOT regulations was a complete defense to petitioner's ADA claim, *id.* at 35a-37a, and that any accommodation by respondent to petitioner's condition "would have been an undue hardship on [respondent]," *id.* at 37a.

c. The court of appeals affirmed, in an unpublished opinion. 97-1992 Pet. App. 1a-6a. The court noted that petitioner's own doctor had testified that "when his high blood pressure is medicated, he 'functions normally doing everyday activity that an everyday person does.'" *Id.* at 4a. Relying on its holding in *Sutton* that the "substantial limitation" inquiry should assess the individual after mitigating or corrective measures are taken, the court held that petitioner's high blood pressure is therefore not a disability. *Ibid.*

The court of appeals also affirmed the district court's ruling that respondent did not regard petitioner as having an impairment that limits a major life activity. The court stated that "[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." 97-1992 Pet. App. 5a. In the court's view, it followed that respondent "in its termination decision, did not regard [petitioner] as having an impairment that substantially limits a major life activity." *Ibid.* The court expressly declined to reach the questions whether petitioner was "otherwise qualified" for the job under the ADA, *ibid.*, and whether the DOT regulations would provide a defense to petitioner's ADA claim. *Id.* at 5a-6a.

DISCUSSION

Both *Sutton* and *Murphy* present the basic question whether the existence of an actual disability under the ADA is to be assessed with or without taking into consideration mitigating or ameliorative measures employed by the individual involved. The courts of appeals are divided on that issue; at least six circuits have held, consistently with the legislative history and authoritative regulatory construction of the ADA, that mitigating measures should not be taken into account. Two courts of appeals, including the Tenth Circuit in these cases, have held that mitigating measures should be taken into account. The issue on which the courts of appeals are divided is a significant one, and further review by this Court to resolve the conflict is therefore warranted. Although the question of mitigating measures is presented by both *Sutton* and *Murphy*, the courts of appeals have tended to view correctable vision impairments like those at issue in *Sutton* as special cases. Because *Murphy* thus presents the mitigating measures issue in a context that is likely to lead to a more general resolution of the issue, *Murphy* provides a better vehicle for the Court to address the mitigating measures issue. In addition, if further review is granted with respect to the mitigating measures issue in *Murphy*, the Court may well benefit from the opportunity to review that issue in the broader context that would be provided by reviewing as well the Tenth Circuit's resolution of the related "regarded as" issue in that case.

1. The basic definition of "disability" under the ADA is an "impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. 12102(2)(A). That definition does not specify whether

the existence or substantiality of the limitation should be measured with or without mitigating or ameliorative measures that the individual could take to improve his or her functioning.

The question whether mitigating or ameliorative measures should be taken into account in assessing a disability has been the subject of frequent litigation, because it is often dispositive of an ADA claim. In employment cases, for example, an individual who is found not to be disabled because mitigating measures are taken into account—and who is not disabled under the "record of disability" or "regarded as" prongs of the statutory definition—is not protected by the ADA. Even if the individual is qualified for the job, see 42 U.S.C. 12112(a), the employer discriminates against him because of his impairment, the individual poses no threat to the health or safety of anyone, see 42 U.S.C. 12113(b), and a reasonable accommodation is readily available that would permit him to do the job, the individual has no claim under the ADA.

Addressing a wide range of physical and mental impairments, the courts of appeals have divided on whether mitigating measures should be taken into account in assessing whether an individual has a disability under the ADA. The First, Second, Third, Seventh, Eighth, and Eleventh Circuits have held that mitigation is not to be considered. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859-866 (1st Cir. 1998) (diabetes); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998) (learning disability); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997) (epilepsy); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998) (diabetes); *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (blindness in one eye),

cert. denied, 118 S. Ct. 693 (1998); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996) (Graves' disease, an endocrine disorder affecting the thyroid gland).² The Tenth Circuit in the instant cases and the Sixth Circuit have ruled that mitigation should be considered. See *Gilday v. Mecosta County*, 124 F.3d 760, 766-768 (6th Cir. 1997) (diabetes) (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part); see also *id.* at 761 (noting that the "opinion of the [sic] Judge Kennedy is the opinion of the court with respect to" the mitigating measures issue). The Fifth Circuit has taken a middle position, holding in a case involving a degenerative rheumatoid condition and a related kidney disease that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state." *Washington v. HCA Health Servs.*, 152 F.3d 464, 470-471 (5th Cir. 1998); cf. *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994).

2. In our view, the majority position on this issue in the courts of appeals is correct. Although the courts of appeals that have held that mitigating measures should be taken into account have argued that the plain terms of the Act mandate that result, see 97-1943 Pet. App. A16; *Gilday*, 124 F.3d at 766-767 (Kennedy, J.,

² In addition, the Ninth Circuit has recited the no-mitigation rule without significant discussion, but then ruled against the plaintiffs on other grounds. See *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996), 117 S. Ct. 1349 (1997); see also *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) (amblyopia ("lazy eye") may be disability, even if brain compensates for it), petition for cert. pending, No. 98-591.

concurring in part and dissenting in part), most courts have held that the terms of the Act are susceptible of either interpretation. The committee reports, however, make clear Congress's understanding that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 52 (1990); see also *id.*, Pt. 3, at 28 ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."). Indeed, the House Reports recounted specific examples that corroborate this understanding:

[A] person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Id., Pt. 2, at 52; accord *id.*, Pt. 3, at 28-29.

In addition, the agencies entrusted with administering the ADA, and whose views are entitled to deference, see *Bragdon v. Abbott*, 118 S. Ct. 2196, 2209 (1998), have similarly concluded that mitigating measures should not be taken into account. In promulgating regulations defining the term "substantially limits," the Equal Employment Opportunity Commission explained that "[t]he determination of whether an individual is substantially limited in a major life activity must be

made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j). See 42 U.S.C. 12116 (requiring EEOC to promulgate regulations "to carry out" Title I of the ADA). The Department of Justice, which is required to promulgate regulations to implement Titles II and III of the ADA, see 42 U.S.C. 12134(a), 12186(b), has also concluded that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." 28 C.F.R. Pt. 35 App. A § 35.104 (preamble to Title II regulations); 28 C.F.R. Pt. 36 App. B § 36.104 (preamble to Title III regulations). These views are consistent with those of the Department of Labor, which enforces Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793. See *Office of Federal Contract Compliance Programs v. Commonwealth Aluminum*, No. 82-OFC-6, 1994 WL 59429, at *6 (Feb. 10, 1994).

3. The question whether mitigating measures should be taken into account in assessing whether an individual has a disability under the ADA is ripe for this Court's resolution. The conflict in the circuits on the issue is clear. There is no reason why an individual's rights or an employer's obligations under the ADA should depend on the fortuity of the circuit in which the individual is employed; as respondent in *Murphy* cogently states, the plight of a national employer that operates in many locations across the country is particularly difficult. See 97-1992 Br. in Opp. 4. Finally, absent review by this Court, the conflict in the circuits appears likely to endure. Although the fractured opinions in *Gilday* suggest that the Sixth Circuit's view on the issue may not yet be firm, the Tenth Circuit in

the instant cases has squarely held that mitigating measures should be taken into account in determining disability. The six circuits that have reached the opposite conclusion have similarly failed to display any indication that their views are tentative or likely to change. Accordingly, further review of this question is warranted.

4. Although *Sutton* and *Murphy* both present the question whether mitigating measures should be taken into account in determining disability, the *Murphy* case provides a better vehicle for the Court to address the issue. Few courts of appeals have addressed correctable myopia—the impairment at issue in *Sutton*—as a disability, perhaps because employers and others (at least outside a few contexts, such as the transportation industry and law enforcement) rarely discriminate on the basis of a correctable vision impairment. But, aside from the Tenth Circuit, the other courts of appeals that have addressed the issue have tended to distinguish correctable vision impairments from other impairments.

For example, the First Circuit in *Arnold* held unequivocally that disabilities are generally to be assessed under the ADA without regard to mitigating measures. See 136 F.3d at 863. The court nonetheless noted that it "might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses." 136 F.3d at 866 n.10. In the court's view, "[t]he availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of 'minor, trivial impairment[], * * * that would not be considered a disability under the ADA.'" *Ibid.* (quoting S. Rep. No. 116, *supra*, at 23). Those same factors seem to underlie the Fifth Circuit's

view that it "c[ould] not say whether mitigating measures such as eyeglasses or laser surgery should be considered in assessing whether an individual is disabled." *Washington v. HCA Health Servs.*, 152 F.3d at 471. The district court in *Sutton* similarly described myopia as a "slight shortcoming[] that [is] both minor and widely shared," 97-1943 Pet. App. A35, whose recognition as a disability would in its view "subvert[] the policies and purposes of the ADA and distort[] the class the ADA was meant to protect," *id.* at A36.

We do not agree that the analysis of a correctable vision impairment differs from the analysis of other impairments under the ADA. There are, however, features of vision impairments like myopia that set them somewhat apart from other impairments under the ADA.³ If the Court were to grant further review in *Sutton*, therefore, it is possible that the Court's ultimate decision would turn on narrow issues about the analysis of myopia under the ADA without resolving the more general question of whether mitigating measures should be taken into account in assessing other impairments. Because hypertension—the condition at

³ Correctable vision impairments under the ADA may present certain unique issues. In determining whether a given correctable vision impairment substantially limits the major life activity of seeing, the claimant's ability to see would have to be compared with "the condition, manner, or duration under which the *average person in the general population* can perform that same major life activity." 29 C.F.R. 1630.2(j)(1)(ii) (emphasis added). Because correctable vision impairments are so widespread, a number of issues arise regarding how to make the comparison between the claimant and "the average person in the general population" and regarding how far the claimant's vision must diverge from the "average person" before the claimant could be found to have a disability. Those issues were not addressed by the court of appeals in *Sutton* and have received little attention from other courts.

issue in *Murphy*—is far more typical of the types of impairments at issue in ADA cases, further review in *Murphy* would give the Court a better opportunity more generally to resolve the conflict in the circuits regarding whether mitigating measures should be taken into account.

The question that divides the circuits is squarely presented in *Murphy*. There is no dispute that, if a disability is to be assessed in the unmitigated state, petitioner in *Murphy* has a disability; his blood pressure is so high without medication (250/160, see 97-1992 Pet. App. 9a) that it would pose an immediate threat to his health. See 97-1992 Pet. 7. There also appears to be no dispute that, if a disability is to be assessed in its mitigated state, petitioner in *Murphy* does not have a disability. Although petitioner himself apparently claims that he has chosen to limit some activities as a result of his blood pressure, see 97-1992 Pet. App. 13a, petitioner's physician testified that petitioner's only restriction is that he should not repetitively lift weights weighing more than 200 pounds, see *id.* at 13a, 31a. The district court held that that restriction alone was insufficient to present a material issue of fact regarding whether petitioner was substantially limited in a major life activity. See *id.* at 31a. Because there is no basis to disturb that holding, the question whether petitioner has an actual disability thus turns entirely on whether his high blood pressure is to be assessed in its mitigated or unmitigated state.⁴

⁴ Of course, even if the Court agreed with petitioner that he is disabled, that would not establish that petitioner can make out his ADA claim. There would remain at least the further issues that the court of appeals declined to reach: whether he was qualified for the job of mechanic at UPS and whether the DOT regulations would provide UPS with a defense. See 97-1992 Pet. App. 5a-6a.

5. The petition in *Murphy* presents three questions in addition to the question regarding mitigating measures. The second question presented concerns whether the issuance of a DOT health card to petitioner precludes respondent's claim that petitioner does not satisfy DOT health standards. 97-1992 Pet. 1. That question appears to concern the particular factual context of this case, it was not reached by the court of appeals, see 97-1992 Pet. App. 5a-6a, and it therefore does not warrant further review. The third question presented concerns whether respondent could have performed his job with reasonable accommodations. See 97-1992 Pet. i. That question does not warrant review; the court of appeals did not reach that question (because it held that petitioner was not disabled and therefore no reasonable accommodation was required), and in any event it appears to be of relevance only in the particular factual circumstances of this case.

The fourth question presented in *Murphy* concerns the court of appeals' holding that summary judgment was properly granted to respondent on petitioner's claim that respondent regarded him as disabled, under 42 U.S.C. 12102(2)(C). See 97-1992 Pet. i. Petitioner claimed that, regardless of whether he was in fact disabled, respondent regarded him as disabled when it terminated his employment, because respondent regarded him as substantially limited in the major life activity of working. The Tenth Circuit rejected that claim. The court concluded that respondent did not regard petitioner as disabled because respondent "did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but rather it terminated him "because his blood pressure exceeded the DOT's requirements for drivers

of commercial vehicles." 97-1992 Pet. App. 5a.⁵ In the court's view, the fact that respondent viewed petitioner as unable to hold the job because of government regulatory criteria was insufficient to raise a material issue of fact as to whether respondent viewed petitioner as disabled—i.e., as substantially limited,

⁵ Both courts below erred in concluding the DOT standards preclude someone with blood pressure higher than 160/90 from obtaining a commercial driver's license. See 97-1992 Pet. App. 5a, 15a-16a, 35a. A regulation issued by the Federal Highway Administration prohibits the operation of commercial motor vehicles by individuals who have "a current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. 391.41(b)(6) (emphasis added). The regulations further provide that, when an individual is tested under that standard, "[i]f the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle." 49 C.F.R. 391.43(f). Thus, although the general rule prohibits individuals whose high blood pressure would interfere with vehicle operation from operating commercial vehicles, blood pressure above 160/90 does not necessarily or categorically trigger that prohibition.

The district court referred to a Federal Highway Administration document entitled "Medical Advisory Criteria for Evaluation Under 49 C.F.R. Part 391.41." 97-1992 Pet. App. 15a-16a. That document recommends that no driver with blood pressure over 181/105 should be qualified to operate a motor vehicle and that drivers with blood pressure between 160/90 and 181/105 may drive for three months and then may be retested to determine whether their blood pressure has been reduced to 160/90 or below. But the document notes that its recommendations "are simply guidance established to help the medical examiner determine a driver's medical qualifications" and that "[t]he medical examiner may, but is not required to, accept the recommendations." Accordingly, this document does not absolutely preclude petitioner from obtaining a commercial driver's license.

because of his impairment, in the major life activity of working.

In our view, the court of appeals' holding on this point was a clear legal error. Regardless of whether respondent based its termination of petitioner on "unsubstantiated fear" concerning his hypertension or on a belief that, as a result of petitioner's hypertension, DOT standards precluded him from driving commercial vehicles, respondent regarded petitioner's impairment as substantially limiting his ability to work. Although the alleged failure to satisfy DOT standards could—if it were correct—assist respondent in showing that petitioner was not qualified for the job, see 42 U.S.C. 12112(a), that petitioner would "pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), or that petitioner failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. 12113(a),⁶ it does not establish or suggest that petitioner was not regarded as substantially limited in his ability to work. To the contrary, it was the very basis for respondent's decision to regard petitioner as substantially limited in his ability to work.

If the Court determines to grant review with regard to the "mitigating measures" issue in *Murphy*, the Court may well determine that review should be granted on this issue as well. It is true that, because the court of appeals' decision is unpublished, its ruling on this point does not create a cognizable conflict with any decision of any other court of appeals; indeed, most other courts to consider the effect of federal regulations

⁶ See also 29 C.F.R. 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by another Federal law or regulation").

on ADA claims have done so in the context of analyzing the employer's defenses, not in the context of ruling on the scope of the "regarded as" prong of the disability definition. See, e.g., *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996); *Prado v. Continental Air Transp. Co.*, 982 F. Supp. 1304, 1307 (N.D. Ill. 1997); *Campbell v. Federal Express Corp.*, 918 F. Supp. 912, 920 (D. Md. 1996). On the other hand, especially if this Court were to hold that petitioner is not disabled (because mitigating measures should be taken into account), respondent ought not be permitted to preclude him from a broad class of jobs on account of his high blood pressure without being held to have "regarded" him as being disabled.⁷ Thus, the two issues in this case are related, such that the Court may well benefit from the opportunity to construe the "actual disability" prong of the ADA's disability definition in the somewhat broader context provided by the "regarded as" prong of that same definition. Accordingly, although this issue would not independently warrant further review, the Court may wish to grant review with respect to this question if it determines to review the issue of mitigating measures.⁸

⁷ DOT certification is required for "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce," 49 C.F.R. 390.3(a), and an inability to obtain certification thus implicates "a class of jobs or a broad range of jobs in various classes." 29 C.F.R. 1630.2(j)(3)(i).

⁸ If the Court grants the petition for a writ of certiorari in *Murphy*, it may help to focus the issues by rephrasing the questions presented as we have done in this brief.

CONCLUSION

The petition for a writ of certiorari in No. 97-1992 should be granted with respect to the first and fourth questions presented. The petition for a writ of certiorari in No. 97-1943 should be held pending this Court's disposition of No. 97-1992 and then disposed of accordingly.

Respectfully submitted.

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No. 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN L. MURPHY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

The Brief for the United States and the Equal Employment Opportunity Commission ("EEOC") as Amicus Curiae agrees with Petitioner and Respondent that certiorari should be granted on the first question presented in the Petition, *i.e.*, whether the definition of "actual" disability under 42 U.S.C. § 12102(2)(A) requires an assessment of impaired individuals in their medicated or unmedicated state.

The Amici brief further suggests the following new question for certiorari, pertaining to the separate issue whether Petitioner could be "regarded as" having a disability under 42 U.S.C. § 12102(2)(C):

Whether an employer that terminates an employee solely because it believes the employee does not satisfy physical criteria established by a third party such as a government regulatory body could be found to have terminated the employee because the employee was "regarded as having" a disability within the meaning of 42 U.S.C. 12102(2)(C).

Amicus Br. at (I). Respondent UPS¹ believes certiorari is not appropriate on the latter question, or on any other question that could be raised based on the record in this case pertaining to the "regarded as" provision in 42 U.S.C. § 12102(2)(C).

ARGUMENT

Certiorari is inappropriate on the second question identified in the Amici brief for the following reasons: (1) there is no basis for reversing the holding of the

¹ Pursuant to Supreme Court Rule 29.6, respondent states that its parent corporation is United Parcel Service of America, Inc. Respondent has no non-wholly owned subsidiaries.

Tenth Circuit on the “regarded as” issue; (2) the question presented by Amici was not set forth in the Petition or fairly included therein, as required by this Court’s Rule 14.1(a);² (3) as Amici acknowledge, the unpublished opinion in this case “does not create a cognizable conflict with any decision of any other court of appeals” (Amici Br. at 18); (4) there otherwise is no conflict in published court of appeals opinions on the “regarded as” question identified by Amici; (5) as implicitly demonstrated by Amici’s inability to cite a single lower court decision addressing or deciding the proposed question, there is no significant relevant body of law on this question in the lower courts; (6) the question proposed by Amici relates to a particular aspect of this case that does not have general application to other ADA cases, because it concerns the interpretation, application and effect of specific regulations and medical criteria issued by the Department of Transportation (“DOT”) on the certification of persons with high blood pressure to drive commercial motor vehicles; (7) one principal argument advanced by Amici -- *i.e.*, that the DOT medical criteria at issue are only guidelines, not requirements -- is contrary to the record in this case, where it is undisputed that under the DOT medical criteria “in order to be physically qualified to drive a commercial motor vehicle [other than a temporary three-month certification] an individual must maintain blood pressure less than or

² Petitioner’s “Questions Presented” did not cite 42 U.S.C. § 12102(2)(C), and stated a far different question pertaining to the “regarded as” issue. The fourth question presented in the Petition seeks review of an alleged dispute of material fact: “Whether there was no genuine dispute whether UPS regarded Mr. Murphy as disabled and fired him because of his hypertension.” Pet. at (i). Petitioner’s one-paragraph argument for certiorari on this question is entirely different than the argument for certiorari advanced in the Amici brief. See Pet. at 7-8.

equal to 160/90;”³ and (8) Petitioner should have challenged the determination that he did not meet DOT requirements by pursuing the administrative appeal process established under DOT regulations (*see* 49 C.F.R. §§ 386.13, 391.47), not by seeking Supreme Court review.

The Tenth Circuit’s holding that UPS did not “regard” Petitioner as having a disability is consistent with the uncontroverted facts, the applicable case law, and even the compliance manual and regulations of the EEOC. The “regarded as” provision applies when employers act upon “archaic attitudes, erroneous perceptions, and myths.” *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995); EEOC Compliance Manual (CCH) § 902.8(f) (1998) (employer action “as the result of myths, fears, stereotypes, or other attitudinal barriers . . .”). The Tenth Circuit properly held that UPS acted not upon myths or fears, but upon the fact (which is incontrovertible on this record) that Petitioner’s blood pressure exceeded the mandatory 160/90 DOT standard. See Pet. App. 5a.

Even accepting *arguendo* Amici’s assertion (which is contrary to the undisputed record in this case) that the DOT standard is a “guideline” rather than a “requirement,” there would be no basis for granting certiorari or reversing the Tenth Circuit on this issue. It makes no difference whether an employer acts upon a DOT requirement or a DOT guideline. In either case, the em-

³ C.A. App. 54, 297. Petitioner argued in the trial court that this fact was more properly considered an issue of law, but he expressly conceded that the DOT medical criteria required that “an individual must maintain blood pressure less than or equal to 160/90.” *Id.* Petitioner did argue below that he had obtained DOT certification and that UPS improperly applied the medical criteria, but those fact-bound arguments were properly addressed by the trial court and provide no basis for certiorari.

ployer is not acting upon "archaic attitudes, erroneous perceptions, and myths." *Wooten*, 58 F.3d at 385.

Additionally, any discretion that may exist under the DOT guidelines would necessarily be vested in the individual(s) responsible for making the certification decision, not in the courts. Because Petitioner never raised below the issue framed by Amici, the record in this case is inadequate to permit this Court to determine whether and how any discretion that may exist was exercised by the relevant decisionmaker(s). And in any event, the federal courts are not the proper forum for reviewing a decision not to certify a particular individual (regardless of whether that decision was mandatory or discretionary). Instead, as noted above, the DOT regulations establish an administrative mechanism for challenging such determinations (*see* 49 C.F.R. §§ 386.13, 391.47), and Petitioner chose not to exhaust his administrative remedies by availing himself of that option. Amici cannot inject into the case at this late stage an issue that should have been pursued through administrative channels before this case even commenced. Amici effectively ask that the Supreme Court of the United States substitute for the Director of the DOT Office of Motor Carrier Research and Standards on the question whether Petitioner should be certified to drive commercial motor vehicles.

Certiorari also is not warranted on the ground that the "regarded as" disability provision of 42 U.S.C. § 12102(2)(C) may relate in some way to the proper construction of the "actual" disability provision (42 U.S.C. § 12102(2)(A)) which is at issue in the first question presented. The Court can consider the significance of the "regarded as" provision as it relates to the "medicated versus unmedicated" issue under the rubric of the first question, without also addressing the entirely separate and distinct "regarded as" question that Amici seek to raise -- a question that would have limited appli-

cation due to the unusual facts of this case and the particularities of the DOT standard at issue.

CONCLUSION

The petition for writ of certiorari should be granted only with respect to the question whether the existence of a disability under 42 U.S.C. § 12102(2)(A) should be determined on a "medicated" or "unmedicated" basis. The petition should be denied with respect to the "regarded as" provision of 42 U.S.C. § 12102(2)(C) and all other issues.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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DOCKET ENTRIES FOR *VAUGHN L. MURPHY v. UNITED PARCEL SERVICE*, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DOCKET NO. 96-3380, AS OF JANUARY 22, 1999

<u>Date</u>	<u>Proceedings</u>
11/26/96	[989782] Civil case docketed. Preliminary record filed. DATE RECEIVED: 11/25/96. Transcript order form due 12/26/96 for Dorothy J. Sheeley-Seel pursuant to R. 42.1, Docketing statement due 12/6/96 for Vaughn L. Murphy, Notice of appearance due 12/6/96 for UPS, for Vaughn L. Murphy. (kjs)
12/4/96	[994413] Notice of appearance filed by Kirk W. Lowry as attorney for Vaughn L. Murphy. CERT. OF INTERESTED PARTIES (y/n): n (lwb)
12/4/96	[994416] Notice received from Appellant Vaughn L. Murphy that a transcript is not necessary for this appeal. (lwb)
12/4/96	[994417] Docketing statement filed by Vaughn L. Murphy. Original and 4 copies c/s: y. (lwb)
12/9/96	[993063] Filed notice record is complete 12/5/96 Appellant's brief and appendix due 1/14/97 for Vaughn L. Murphy. (ab)
12/18/96	[995609] On the court's own motion and pursuant to 10th Cir. R. 33.1, order filed by (PF) to extend time to file appellant's brief until 1/28/97 for Vaughn L. Murphy. Appellant's appendix due 1/28/97 for Vaughn L. Murphy. Parties served by mail. (ab)

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1/16/97 [1014179] Notice of appearance filed by James R. Holland, Brian J. Finucane as attorney for UPS. CERT. OF INTERESTED PARTIES (y/n): n (kjs)

1/21/97 [1002301] On the court's own motion and pursuant to 10th Cir. R. 33.1, order filed by (PF) to extend time to file appellant's brief until 2/27/97 [96-3380] Appellant's brief due 2/27/97 for Vaughn L. Murphy, Appellant's appendix due 2/27/97 for Vaughn L. Murphy. Parties served by mail. (mt)

1/27/97 [1004000] Case settlement conferencing terminated. (lwb)

3/3/97 [1013056] Appellant's brief filed by Vaughn L. Murphy. Original and 7 copies. c/s: y. Served on 2/27/97; Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 454. Appellee's brief due 4/1/97 for UPS. (kjs)

3/3/97 [1014221] Amicus brief filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y Oral Argument? y (ab)

3/3/97 [1014224] Notice of appearance filed by Paula R. Bruner as attorney for Equal Employment. CERT. OF INTERESTED PARTIES (y/n): n (ab)

3/27/97 [1020876] Appellee's motion to extend time to file appellee's brief until 4/22/97 filed by UPS. Original and 3 copies. c/s: y (ab)

Docket Entries

3/28/97 [1020877] Order filed by PF granting Appellee's motion to extend time to file brief until 4/22/97 for UPS. (20 day extension) Parties served by mail. (ab)

4/17/97 [1027057] Appellee's motion to extend time to file appellee's brief until 5/2/97 filed by UPS. Original and 3 copies. c/s: y (ab)

4/18/97 [1027059] Order filed by PF granting Appellee's motion to extend time to file brief until 5/2/97 for UPS. NO FURTHER EXTENSIONS. Parties served by mail. (ab)

5/5/97 [1031863] Appellee's deficient brief filed by UPS. Appellee's corrected brief due 5/19/97 for UPS (kjs)

5/12/97 [1032788] Rules violation warning letter sent to James R. Holland for Appellee UPS. (sls)

5/14/97 [1035044] Appellee's brief filed by UPS. Original and 7 copies. c/s: y. Served on 5/13/97; Oral Argument? y. Appellant's optional reply brief due 5/30/97 for Vaughn L. Murphy. (kjs)

7/7/97 [1049350] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y (lwb)

8/6/97 [1057306] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y (ab)

Docket Entries

8/8/97 [1058051] Appellee's supplemental authority filed by UPS. Original and 7 copies. c/s: y (lwb)

9/9/97 [1066561] Hearing set for Nov. 1997 Session, at Denver, Colorado. (ss)

9/12/97 [1067542] Appellee's supplemental authority filed by UPS. Original and 7 copies. c/s: y (lwb)

9/16/97 [1068783] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y (lwb)

10/7/97 [1073979] Motion to present oral argument [96-3380] filed by Equal Employment. Original and 3 copies. c/s: y (lwb)

10/8/97 [1074600] Motion to present oral argument filed by Amicus Curiae Equal Employment submitted to panel. (sls)

10/10/97 [1075462] Appellant's settlement conference report filed. Original and 0 copies (mt)

10/14/97 [1075627] Order filed by PF granting motion of amicus curiae to present oral argument [1073979-1]. Parties served by mail. (sls)

11/17/97 [1084487] Case argued and submitted to Judges Seymour, Anderson, Henry. (sls)

11/19/97 [1085973] Supplemental authority filed by Appellee UPS and submitted to panel. Original and 3 copies. c/s: y (mt)

Docket Entries

11/28/97 [1088133] Errata sheet filed by Vaughn L. Murphy Original and 3 copies. c/s:y. (kjs)

12/15/97 [1092363] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y. (kjs)

12/15/97 [1092364] Supplemental authority submitted to panel. (kjs)

12/16/97 [1092724] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y. (kjs)

12/16/97 [1092726] Supplemental authority submitted to panel. (kjs)

1/14/98 [1099212] Letter from appellant stating he has no objection to consolidation of appeal, filed by Appellant Vaughn L. Murphy. Original and 3 copies. c/s: y (lwb)

1/14/98 [1099219] Letter from appellee stating objection to consolidate appeals, filed by Appellee UPS. Original and 0 copies. c/s: y (lwb)

1/16/98 [1100700] Supplemental authority filed by Amicus Curiae Equal Employment and submitted to panel. Original and 9 copies. c/s: y (mt)

3/2/98 [1110978] Supplemental authority filed by Amicus Curiae Equal Employment Opportunity Commission and submitted to panel. Original and 7 copies. c/s: y (mt)

Docket Entries

3/11/98 [1113047] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Unpublished. Seymour; Anderson; Henry, authoring judge. (kjs)

4/2/98 [1119117] Mandate issued. Mandate receipt due 5/4/98 (kjs)

4/13/98 [1122057] Mandate receipt filed. (kjs)

5/26/98 [1132925] Case file closed. (drw)

6/15/98 [1139091] Petition for writ of certiorari filed on 6/9/98 by Appellant Vaughn L. Murphy. Supreme Court Number 97-1922. (kjs)

1/21/99 [1197431] Supreme Court order dated 1/8/99 granting certiorari filed. (kjs)

**AMERICANS WITH DISABILITIES ACT,
42 U.S.C. § 12101 *et seq.* (1990)**

* * *

GENERAL PROVISIONS

§ 12101. Findings and purposes

(a) Findings

The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

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(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

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(b) Purpose

It is the purpose of this chapter —

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes —

(A) qualified interpreters and other effective methods of making aurally delivered materials available to individuals with hearing impairments;

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(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

*Americans with Disabilities Act***TITLE I EMPLOYMENT****§ 12111. Definitions**

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

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(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include —

(i) the United States, corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the

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Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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(9) Reasonable accommodation

The term "reasonable accommodation" may include —

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include —

(i) the nature and cost of the accommodation needed under this chapter;

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(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

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(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes —

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration —

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

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(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

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(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on —

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(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Pre-employment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

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(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if —

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that —

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

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(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113 Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to

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screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall —

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(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant

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risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol**(a) Qualified individual with a disability**

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who —

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or

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procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity —

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that —

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such

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regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

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(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to —

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title

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shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

§ 12116. Regulations

Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code [5 USCS §§ 551 et seq.].

§ 12117. Enforcement**(a) Powers, remedies, and procedures**

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the

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Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] not later than 18 months after July 26, 1990.

* * * *

ADA EEOC REGULATIONS, 29 C.F.R. § 1630.2 *et seq.* (1992)

* * *

ADA TITLE I
EEOC REGULATIONS

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§ 1630.2 Definitions.

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(g) Disability means, with respect to an individual —

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; and

(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

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(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits —

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

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(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working —

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

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(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

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(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

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ADA TITLE I EEOC INTERPRETIVE GUIDANCE

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EEOC INTERPRETIVE GUIDANCE**

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Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment. To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

*ADA Title I EEOC Interpretive Guidance*Section 1630.2(h)
Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the

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definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

Section 1630-2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the

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individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment. An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under

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which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case

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basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if

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an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment,

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but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise

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office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

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Section 1630-2(l)

Regarded as Substantially Limited in a Major
Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the

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definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

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An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might

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not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

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TESTIMONY AND AFFIDAVIT OF VAUGHN MURPHY

TESTIMONY OF VAUGHN MURPHY

Murphy Depo.

Q. So there would be times during your shift where you would be the only mechanic on duty in Topeka?

A. That's correct.

Q. And so you would be the only one there at certain times to do these road tests on the trucks and the package cars; is that right?

A. That's correct.

(R. 105, ln. 14-20)

Q. So you mentioned that to Monica Sloan?

A. That's right.

Q. What did she tell you?

A. She said UPS requires 140 over 90.

Q. And this was before going back in and being rechecked?

A. That's correct.

(R. 106, ln. 8-13)

Q. What does it show that your blood pressure reading was?

Testimony and Affidavit of Vaughn Murphy

A. 160 over 102 and 164 over 104 on the other arm.

(R. 107, ln. 1-3)

Q. When you called Monica Sloan, was she in?

A. I believe so.

Q. As best you can remember, tell me what happened during that conversation. What was said?

A. I related these figures to her. And her reply to me was that I couldn't return to work until it was — I don't know what the proper word would be — resolved, until this matter had been resolved.

(R. 107, ln. 16-23)

A. I felt that it was slightly elevated, but, you know, everyone gets — my doctors always tell me, well, when you are next to the doctor, you get — they take that into consideration. It is slightly elevated, you know, that you are nervous and it is an important —

(R. 108, ln. 13-17)

Q. Well, you knew that the federal regulations, based upon looking at the regulations yourself, required 160 over 90; is that correct?

A. That's correct.

(R. 109, ln. 21-24)

Testimony and Affidavit of Vaughn Murphy

Q. Since 1977 or '78 when Dr. Knacksted first told you that your hypertension was a serious problem, do you recall any significant time period in there where your blood pressure was below 160 over 90 on a continuous basis?

A. Just for a short period. It was with some medication. It was just — the side effects were just too extreme.

Q. So other than that short period, your blood pressure has never, on a consistent basis, been below 160 over 90?

A. That's correct.

Q. And when it did get below that number, the side effects were too great to continue that type of medication?

A. That's correct.

(R. 110, ln. 1-16)

Q. After you were taken off work by Monica Sloan, is that when you requested the waiver?

A. That's correct.

Q. And you did that with Rudy Arzola?

A. That's correct.

Q. Can you nail down a date at all about when that happened?

Testimony and Affidavit of Vaughn Murphy

A. No, I cannot, not for sure, not the actual date.

Q. Within a few days?

A. It was within a few days of the 5th, somewhere in there. Not the 5th, but of Ms. Sloan's —

Q. Did you ever ask for a chance to get your blood pressure down?

A. Yes.

Q. Of who?

A. Of Rudy.

Q. What did he say?

(R. 115, ln. 9-25)

AFFIDAVIT OF VAUGHN MURPHY

2. I was never required to take a driving test or any other test with respect to driving as part of my employment application or orientation with UPS.
3. I have never been diagnosed as having cerebrovascular disease to my knowledge. My blood pressure was taken on August 16, 1994. The measurements did not begin after five minutes of rest. The cuff was not the appropriate size, it was too small. David Couch only took one reading, not two, to the best of my knowledge.

(R. 324, 325, Paragraphs 2, 3)

*Testimony and Affidavit of Vaughn Murphy***TESTIMONY OF VAUGHN MURPHY***Murphy Depo.*

A. Some of the medication tends to give me gout. It is a form of arthritis. It can be crippling. It can put you in bed for up to a week or 10 days, depending on where you get it and how severe you get it, how soon you start the remedy for it. Sometimes the remedy affects the blood pressure medication. Just like a cold, I have to be careful what I take over the counter versus my blood pressure medication. So, you know, it is a constant battle. Every day, you have to think about can I take this, can I eat that. It is a never ending thought of how you live. But you form a habit and that is how you work.

(R. 327, ln. 1-12)

Q. You had mentioned that with your jobs, the effect that hypertension has had on your jobs, that you don't lift heavy objects without either a lever or having somebody else help you, you don't run across the shop to answer the phone. What other ways has hypertension affected your ability to be able to perform a job, any of the jobs that you have held?

A. Well, I am not sure right now. I am kind of at a loss of an answer other than what we have spoke about.

(R. 327, ln. 13-21)

Testimony and Affidavit of Vaughn Murphy

Q. You had said that occasionally while you were working at Ryder and the company that they bought over that 19 years, that sometimes your medication would cause you to have side effects. You would be angry; you would get high tempered with people; is that correct?

A. That's correct.

Q. Other than that, did your hypertension ever cause you to be unable to do any other functions that you were required to do?

A. Some of the job duties that I performed, I did differently and was questioned of it sometimes because I found it easier to do some things the way that — I had tricks, if you want to call it that, shortcuts. Let's say a tire on a truck, some guys would just jerk

(R. 328, ln. 12-25)

it off and try to roll it across the floor. I would go get a two wheeled cart, slip under it and wheel it across the floor with a cart. I don't know if you would call that working smart or just the habit I had formed trying to save my knees and my body. If I bruised a knee, the gout would set in. So I tried to work with what I had to stay as competitive as I could.

Q. And with these tricks or shortcuts that you had adapted, you were able to perform the job without any real problems even though you had hypertension?

A. Basically.

(R. 329, ln. 1-12)

Testimony and Affidavit of Vaughn Murphy

Q. What did Mr. Arzola tell you was the reason your training was being terminated?

A. Because of my hypertension.

(R. 333, ln. 20-25)

Q. In order to get your blood pressure below 160 over 90, what would be required?

A. Probably some modification of my medication.

Q. What type of modification, if you know?

A. I don't know. I know when they changed them before, it was a gradual change and not just a sudden one to the other.

Q. Changing the medication or increasing the dosage of the medication to get it below the 160 over 90, would that cause any side effects?

A. It is unknown until we try it.

(R. 334, ln. 15-25)

Q. Since 1977 or '78 when Dr. Knacksted first told you that your hypertension was a serious problem, do you recall any significant time period in there where your blood pressure was below 160 over 90 on a continuous basis?

Testimony and Affidavit of Vaughn Murphy

A. Just for a short period. It was with some medication. It was just — the side effects were just too extreme.

Q. So other than that short period, your blood pressure has never, on a consistent basis, been below 160 over 90?

A. That's correct.

Q. And when it did get below that number, the side effects were too great to continue that type of medication?

A. That's correct.

(R. 335, ln. 1-16)

Q. After Mr. Arzola told you that you were being terminated or that your training was being terminated on October the 5th, did you continue the process of trying to obtain a waiver?

A. No, I did not.

(R. 335, ln. 21-25)

Q. If they would have given you 30 days, would you have been able to get it down below 160 over 90?

A. I would have tried desperately.

Q. Do you think you would have been able to?

Testimony and Affidavit of Vaughn Murphy

A. Without trying that, I don't know. There are new medications. And Dr. Doubek, who I had not seen too long, she might have had some better ideas. You know, I offered to do that for Rudy, and they said it's too late.

Q. The only time, however, that your blood pressure has been below 160 over 90, you have had bad side effects from the medication; is that right?

A. Below 140 over 90.

Q. I thought you told me earlier it was 160 over 90?

A. No. It usually averages 160 over 100, somewhere in there. Below 140 over 90 is when it started — side effects were problems.

(R. 336, ln. 9-25)

Q. You would be able to get it down below 160 over 90 without having side effects or you have done it in the past?

A. I would attempt to try to. If I had been allowed proper time and the chance to deal with my doctor and attempt it, I would have tried to.

Q. I thought you had told me earlier, though, that the only time you have ever been able to get it down below 160 over 90 was when you were on medication with Dr. Knacksted and had bad side effects?

Testimony and Affidavit of Vaughn Murphy

A. That was below 140, sir.

Q. So you believe you would be able to get it down below 160 over 90 without having bad side effects?

A. I think I can, yes.

(R. 337, ln. 1-14)

EXAMINATION BY MR. LOWRY:

Q. Vaughn, you have hypertension, correct?

A. That's correct.

Q. And you have had it since age eight or nine?

A. That is close, yes.

Q. As of August, September and October of 1994, how did that hypertension affect your activities of daily living?

A. Well, you had to watch how you did some things. You know, you didn't run for the phone, you didn't chase after cabs or buses. If I had to lift something heavy, I would get a bar. I watched my diet, drink plenty of fluids, be careful what you eat and drink.

Q. Did it affect how you exercised?

A. You can't exercise. You have to do that moderately.

(R. 338, ln. 11-25)

Walking is considered exercise for me.

Testimony and Affidavit of Vaughn Murphy

Q. Did you place any limits on yourself on walking or exercising?

A. Just as day to day how you felt to do it.

Q. Did your hypertension affect your ability to lift?

A. Yes.

Q. How?

A. You had to be careful about how and how heavy you lifted, how high, what position you had to lift with. If you had to lift something heavy, you looked for a lift or a lever or a cherry picker or help.

Q. Did it affect how long you could do certain things, like your endurance?

A. Yes.

Q. Your stamina?

A. Yes.

Q. How?

A. Short winded, you become short winded sometimes fairly easy if you had to carry something very far.

Q. Did it affect your diet?

A. Oh, yes.

Testimony and Affidavit of Vaughn Murphy

Q. How?

A. You have to watch what you eat, the fats, the salts. You know, some foods are — affect — some of the medications I get will give you gout. Some foods tend

(R. 339, ln. 1-25)

to bring that on sooner than others did.

Q. Did it affect your sight or your hearing?

A. If your blood pressure would go up, your ears would ring, make it hard to hear.

Q. Did it affect your sight at all?

A. It could make — you could see runners in your eyes occasionally if your blood pressure is up.

Q. What is a runner?

A. When you see like a bubble go across your eyeball, you know, something making a path.

Q. It just looks kind of like a flash of light or something?

A. Yeah, like a bug walked across or flew by you.

Q. What would you call very heavy work, what types of jobs?

Testimony and Affidavit of Vaughn Murphy

A. Oh, working on construction machinery, concrete maintenance repair type, bridge work, that would be heavy. Steel work, I am sure that would be heavy.

Q. Do you think you could do that kind of work?

A. No, I couldn't.

Q. Why not?

A. It would be out of my range of lifting.

Q. Because of your hypertension?

A. That's correct.

Q. What would you call heavy work?

(R. 340, ln. 1-25)

A. I would say construction, loading, unloading trucks, moving furniture.

Q. Do you think you are able to do that type of heavy work, that class of heavy work?

A. I wouldn't think so.

Q. How would you describe mechanic work?

A. It is a medium work.

Testimony and Affidavit of Vaughn Murphy

Q. Do you feel you are able to do medium work?

A. I have been able to perform that, yes.

(R. 341, ln. 1-9)

Q. What did you put down for Interrogatory No. 12; what was your answer?

A. "All mechanic duties including inspection, repair, preventative maintenance."

Q. Can you break that down a little bit more as to what

(R. 341, ln. 21-25)

the fundamental job duties of a mechanic are at UPS?

A. Probably change oil in trucks; lube them; tighten the nuts and bolts; make sure the mufflers are under them; the lights are running; make sure the horn honks; the doors lock; make sure they are safe so that they don't run over someone.

(R. 342, ln. 1-6)

Q. Did you have any other duties other than fixing trucks, inspecting them, doing preventative maintenance?

A. Not that I was told of. Well, maybe some record keeping.

Testimony and Affidavit of Vaughn Murphy

MR. HOLLAND: I am going to object to these answers, but I am going to object to the form of the question because he has already testified that there were other functions.

Q. (BY MR. LOWRY) Were you ever told that driving a truck was going to be part of the job duties of a mechanic?

A. Yes.

Q. By who?

A. By Rudy.

Q. Is driving a truck in your opinion one of the fundamental job duties, or is it a peripheral job duty of a mechanic?

MR. HOLLAND: Object to the question. It

(R. 342, ln. 7-25)

calls for a legal conclusion. You can answer it.

A. A fringe area.

(R. 343, ln. 1-3)

Q. How many times did you do that while you were at UPS over that month and a week time period or so?

Testimony and Affidavit of Vaughn Murphy

- A. I am not sure. Maybe a dozen or 18 times. It might be the same truck over the same block.

(R. 343, ln. 8-11)

- Q. You said that you are unable to run and you are unable to lift heavy objects; is that right?

A. That's correct.

(R. 344, ln. 2-4)

- A. I am just — I have been recommended by my doctor not to exert on heavy items.

- Q. Did your doctor ever define heavy item for you?

A. Basically if it feels like you are straining, don't lift it.

(R. 344, ln. 17-21)

- Q. And has your doctor ever given you a formal restriction to give to your employer to say don't let Vaughn lift over a certain amount?

A. No.

(R. 344, ln. 22-25)

**TESTIMONY AND REPORT OF DEBRA DOUBEK, M.D.
(MR. MURPHY'S PRIVATE PHYSICIAN)**

TESTIMONY OF DEBRA DOUBEK, M.D.

- Q. Should Vaughn Murphy have any restrictions against his activities or his work because of his high blood pressure?

A. I — if he wanted to work for a loading dock and lift 200 pounds of cargo, freight repetitively day in and day out, I would probably limit him from extreme situations like that.

(R. 150, ln. 18-24)

- Q. Okay, and based upon your examinations of Mr. Murphy, if you were to give him medication, either increase the dosage that he's already on or to give him another type of medication to get it below 160 over 90, isn't it true that Mr. Murphy would, in his own words, not be able to function to get it down that low?

A. Correct.

(R. 151, ln. 11-17)

- Q. What effect, if any, would Mr. Murphy's hypertension have on his every day life?

A. He functions normally doing everyday activity that an everyday person does.

- Q. And assuming that a blood pressure reading of 160 over 90 is required for the job that Mr. Murphy wanted,

Testimony and Report of Debra Doubek, M.D.

would Mr. Murphy ever be able to be qualified for that job?

A. With that assumption that you just gave, no.

(R. 152, ln. 2-9)

Q. When you said he's able to do everything that a normal person can do, you meant medicated? That Vaughn Murphy with his hypertension medicated?

A. Correct.

(R. 152, ln. 13-16)

Q. How would you characterize that uncontrolled blood pressure?

A. Very severe.

Q. And what are the effects of severe high blood pressure?

A. Severe high blood pressure can cause end organ damage, such as retinal hemorrhages, retinal damage, kidney damage, heart damage. We call those end organs.

Q. Did he have any evidence that you could tell of any end organ damage?

A. On September the 28th when he presented I didn't have enough information to make that judgment.

Testimony and Report of Debra Doubek, M.D.

Q. What would you need to do to determine that?

A. Blood work, a recent eye exam, an EKG, a chest x-ray, none of which were done.

(R. 346, ln. 1-15)

Q. What blood pressure are you trying to maintain with Vaughn Murphy?

A. Ideally I would like his blood pressure to be in the 140 over one — 140s over 80s range.

(R. 347, ln. 5-8)

Q. (BY MR. LOWRY) Yeah, Jim has referred us to May 16th, 1995, your note of that date, the second page of that. It's, normal for him runs 150 over 100, plus or minus five?

A. Correct.

Q. And then it says, when he's not on hypertensive medication his blood pressure runs 220 to 240 over 160 to 180

(R. 347, ln. 20-25)

Q. Hypertension is not normal, though, correct? If somebody has hypertension, they have something wrong with them?

A. It's considered to be a disease process, correct.

Testimony and Report of Debra Doubek, M.D.

Q. Okay, and it's a disease process of the cardiovascular system?

A. Of the blood vessels, correct.

Q. Should Vaughn Murphy have any restrictions against his activities or his work because of his work because of his high blood pressure?

A. I — if he wanted to work for a loading dock and lift 200 pounds of cargo, freight repetitively day in and day out, I would probably limit him from extreme situations like that.

Q. Okay, like for very heavy or heavy work?

(R. 348, ln. 11-25)

A. Correct.

(R. 349, ln. 1)

Q. How would you characterize the nature and severity of Vaughn Murphy's hypertension?

A. Mr. Murphy has very severe or stage four hypertension.

Q. And what's the diagnostic criteria for that?

A. According to the National Institute of Health, very severe or stage four hypertension is a systolic of greater than or equal to 210 millimeters of mercury, systolic greater than or equal to 120 millimeters of mercury

Testimony and Report of Debra Doubek, M.D.

diastolic, and according to his history, his untreated blood pressure fits

(R. 349, ln. 16-25)

that criteria.

Q. Okay, and that's untreated and not medicated?

A. Correct.

Q. Is his high blood pressure, hypertension permanent?

A. Yes.

Q. Would you restrict Vaughn Murphy's diet or the things that he eats?

A. Yes.

Q. What would be your restrictions on his diet?

A. He's overweight. He would ideally do best on a low fat, low cholesterol, low sodium, high fiber diet.

(R. 350, ln. 1-11)

Is Vaughn Murphy's hypertension likely to interfere with his ability to operate a commercial motor vehicle safely?

A. No.

(R. 351, ln. 10-13)

Testimony and Report of Debra Doubek, M.D.

Q. Okay. Would it be possible for Mr. Murphy to lower his blood pressure to below the 150 over 100 plus or minus five with medication or without? Is it possible for him to get it any lower than that?

A. It's in the realm of possibility. Many medications have been tried and if one did find a blood pressure medication that would do that, he said he can't function.

Q. Okay, so in order to, for Mr. Murphy's blood pressure to be 160 over 90 or below, he would have to be on such a high dosage of medication that he would not be able to function?

A. I can't say that's an accurate statement. I don't know about this high dosage of medication. Sometimes physicians use multiple, three or four regimens at lower doses, so, I don't agree with that statement necessarily.

Q. Okay. Would it be possible for Mr. Murphy to get his blood pressure reading below 160 over 90?

A. It's in the realm of possibility.

(R. 352, ln. 8-25)

*Testimony and Report of Debra Doubek, M.D.***REPORT OF DEBRA DOUBEK, M.D.**

September 29, 1994

Vernon Wenger, Transportation Manager
State Corporation Commission
1500 S.W. Arrowhead Rd.
Topeka, KS 66604-4027

RE: Vaughn Murphy

Dear Mr. Wenger,

Vaughn is a 43-year-old white male who just started on with your company on August 18, 1994. Mr. Murphy is a new patient to me today. I have taken care of his mother for several years. I am a board certified family physician in private practice in Manhattan Kansas. Mr. Murphy has come to my clinic today for a waiver of physical requirements. Mr. Murphy had some records with him today and I took a detailed history about his problems with hypertension. He has had problems with his blood pressure since the age of 9. He has been followed by multiple physicians for his blood pressure problems across the state including a Dr. Knackstedt in Phillipsburg Kansas where Mr. Murphy lived for 15 years. He has been followed by Dr. Yapel in Salina for 2 years and has seen a physician in Junction City since moving to this area. In addition he has seen cardiologist specialist Dr. Evans from Wichita on several occasions. His blood pressure regimen has remained unchanged for the last 2 years and he feels wonderful on this blood pressure regimen. He has tried approximately 9 other blood pressure medications all of which he had side effects to. He has had multiple testing for the cause of his high blood pressure

Testimony and Report of Debra Doubek, M.D.

including testing of his heart and kidneys and it is felt that he has essential hypertension, which is of undetermined etiology. Mr. Murphy's blood pressure does tend to run high but it has been felt by his physicians caring for him that his current blood pressure readings are ok for this individual. Many of the blood pressure medications that he has tried in the past have brought his blood pressure lower but he does not feel well when it is down to what we usually consider a normal reading of 120/80. When his blood pressure gets that low he cannot get out of bed and cannot function in a productive manner. His blood pressure in my office today is 166/100. He faithfully takes his 2 blood pressure medications which are Tenormin 50 mg daily and Zestril 10 mg daily. He recently passed his department of transportation physical administered on 8/15/94. I have performed a physical exam today which was normal. In summary, his blood pressure readings are elevated but I feel he is healthy to drive a truck for test purposes.

Respectfully,

Debra Doubek, M.D.

DD/dm

(R. 353/354 Doubek letter)

**TESTIMONY AND MEDICAL HISTORY FORM OF
DAVID COUCH (DOT EXAMINER)**

TESTIMONY OF DAVID COUCH

Q. So Vaughn Murphy has a permanent physiological disorder?

A. Yes, sir.

Q. And his physiological disorder is high blood pressure?

A. Yes, sir.

Q. Does that permanent high blood pressure cause him to be unable to perform daily activities that an average person could do?

A. I think we would have to specifically state what activities.

Q. Activities of daily living?

(R. 147, ln. 14-25)

A. No.

(R. 148, ln. 1)

Q. Is hypertension a physiological disorder?

A. Yes, sir.

Q. What system is it a part of?

Testimony and Medical History Form of David Couch

A. It's part of the cardiovascular system.

Q. Okay. And hypertension would be someone with blood pressure or hypertension is a blood pressure of over 140 over 90?

A. Persistent and prolonged elevation over 140 over 90.

Q. What does having a blood pressure of 140 over 90 or above consistently mean? What does — what is that in your system?

A. Basically, blood pressure is a measurement of the pressure of the blood through the pipes, if you will, the arteries. That's how it's measured. The problem is is that a person with long-standing high blood pressure can develop what's called end target damage or target organ damage, I

(R. 356, ln. 9-25)

should say. And specifically we look at the kidneys, look at the eyes, look at the heart and so on. People that have high blood pressure have a higher incidence of heart attacks, for example, have a higher incidence of renal problems, such as renal shutdown, kidney disease. People that have long-standing hypertension can have bleeds in the back of the eyes. So prolonged high blood pressure can damage other organs within the body.

Q. Is high blood pressure, in your opinion, a physical impairment?

Testimony and Medical History Form of David Couch

A. May have to explain to me what you mean by physical impairment.

Q. Is it a deviation from the norm?

A. Yes.

(R. 357, ln. 1-14)

Q. Okay. Now, after No. 24, it goes onto medical examiner's certificate, correct?

A. Yes.

Q. And you have filled that out?

A. I signed my name and license number.

Q. And read that part for me.

A. "I certify that I have examined Murphy Vaughn, II in accordance with Motor Carrier Safety Regulations and then 49 C.F.R. 391.41 through three 391.49 and with knowledge of the duties involved, I find this person qualified under the regulations.

Q. Okay. So on that date you qualified him, correct?

A. As the position of mechanic.

(R. 358, ln. 4-16)

Testimony and Medical History Form of David Couch

Q. Okay. What's your understanding of the position — of the duties of the position of mechanic?

A. That he would — he's a diesel engine mechanic, so he would repair the diesel engines and associated mechanical appurtenances of a truck.

Q. Okay. Have you been out to UPS?

A. No, sir.

(R. 358, ln. 17-23)

A. At the time I did Mr. Vaughn, he was the first mechanic I have done for UPS.

(R. 359, ln. 2-3)

A. Obesity and hypertension were the diagnosis.

Q. Lab data, No. 50?

A. He showed a little bit of protein of two plus in his urine dipstick.

Q. What does that mean?

A. That means he's got a little bit of protein in his urine which could be due to hypertension.

Q. Okay. Is that a significant problem?

A. Well, it could be an early indicator of some target organ damage.

Q. To the kidney?

Testimony and Medical History Form of David Couch

A. To the kidneys, yes, sir.

(R. 361, ln. 1-12)

Q. Okay. No. 56, medical recommendation. What was your recommendation?

(R. 361, ln. 24-25)

A. My recommendation was "Recommended without restriction or accommodation for mechanic position."

Q. All right. And certificate expiration date?

A. 8-16-96.

Q. It goes for two years?

A. Yes, sir.

(R. 362, ln. 1-6)

Q. Is his high blood pressure, in your opinion, under control with the medication?

A. No, sir.

Q. Okay. So if he — when you tested him, he was under two different blood pressure medications, correct?

A. Yes, sir.

Testimony and Medical History Form of David Couch

Q. And it's still high?

A. Yes, sir.

Q. What does that mean?

A. To me, that indicates that he's inadequately controlled and that was why he was asked to follow up with his primary care provider.

Q. Can Vaughn Murphy or — let's talk about restrictions. Would you give Vaughn Murphy any restrictions as to how far he could walk as opposed to the normal person?

A. What I would encourage him, if he was to get on a walking program, would be to start very slowly and then gradually increase. I would not give him any specific restrictions without further testing to see what his capacity would be.

Q. Would you recommend that he not run like the average person would?

A. Yes, sir.

Q. Why?

(R. 363, ln. 2-25)

A. Well, running, he would be a good candidate for the development of angina with his size and with his high blood pressure. And if he was to be involved in an exercise program, the first step would be walking and

Testimony and Medical History Form of David Couch

then over time if he lost weight and his cardiac abilities increased, then certainly he could move up to a running program, but not immediately.

Q. Are there any types of work — let me foundation it a little bit. You hand primarily workers in your practice?

A. Yes, sir.

Q. That's what occupational health means. You're dealing with workers and their injuries and health problems, correct?

A. Yes, sir.

Q. Would you restrict Vaughn Murphy from any types or classes of work because of his high blood pressure?

A. Possibly so, yes, sir.

Q. Possibly or probably?

A. Probably, depending on the type of work he's applying for.

Q. What types or classes of work would you recommend that he not do or have restrictions from?

A. I would restrict him from any type of work that requires a great deal of physical exertion and cardiac exertion.

(R. 364, ln. 1-25)

Testimony and Medical History Form of David Couch

Q. Like heavy work?

A. Yes.

Q. Are you familiar with the occupational categories of very heavy, heavy, medium?

A. Yes, sir.

Q. Is that something that you use in your practice?

A. It's in some cases we do.

Q. What classes of work, as far as being those types of designations, would you suggest that he not do?

A. Anything over medium.

Q. So that would be very heavy and heavy?

A. Right.

Q. So he should be restricted to a medium?

A. Or less.

Q. Or less?

A. Yes, sir.

Q. Does that restrict him out of a broad class of jobs?

Testimony and Medical History Form of David Couch

A. I would restrict him out of classes such as heavy construction work, steel workers, any type of job that again requires a great deal of physical activity or endurance.

Q. All right. And is it your job to give workers restrictions? Is that part of your work there at Occupational Health?

A. It may be.

(R. 365, ln. 1-25)

Q. Okay. How would you restrict him — or what conditions would you restrict him from?

A. I would restrict him from heavy physical exertion, lots of climbing, positions that would cause a significant cardiac work load.

Q. Would you place any specific restrictions on the manner of his activities?

A. Possibly, but I would — before putting objective findings, I would try to do a functional capacities evaluation on him and see what he can do or specifically match him to a specific job.

(R. 366, ln. 2-12)

Q. Would you restrict Vaughn Murphy in the duration or the length of time that he does any specific work activity?

Testimony and Medical History Form of David Couch

A. Again, it would depend again on the type of

(R. 366, ln. 23-25)

system?

(R. 367, ln. 1)

Q. (BY MR. LOWRY) Yes, as to duration of activities, condition of activities or manner of activities.

A. Generally speaking, again, anything with a heavy to very heavy work load, lots of repetitive climbing, lots of heavy physical work.

Q. How would you characterize the nature and severity of Vaughn Murphy's hypertension?

A. I would classify his high blood pressure as taken on this day as moderately severe.

Q. Under medication?

A. Under medication.

Q. Do you have any idea as to what his hypertension is without medication?

A. No, sir, I do not.

Q. If he had a high blood pressure of 250 over 160, how would you characterize that?

(R. 367, ln. 10-25)

Testimony and Medical History Form of David Couch

A. That would be severe and I would be looking at referral to a physician for possible hospitalization.

Q. A cardiologist?

A. Cardiologist or an internist.

Q. We've already talked about the duration and you said that you thought it appeared to be chronic and permanent?

A. Yes, sir.

Q. All right. What is the permanent or long-term probable impact of Vaughn Murphy's hypertension?

A. My concern would be that he would at some point have a problem with end target damage, could have a heart attack, heart failure, kidney failure, visual disturbances, et cetera, stroke.

Q. Could die?

A. Yes, sir.

(R. 368, ln. 1-16)

*Testimony and Medical History Form of David Couch***MEDICAL HISTORY FORM OF DAVID COUCH****MEDICAL HISTORY FORM**

Name: Vaughn L. Murphy, II

SS#: 482-60-7071

Date: 8/16/94

DOB: 12/20/50 Position: Mechanic

Personal Physician: Dr. Richard Yapple

Address: Claflin Ave., Salina, KS

STATEMENT OF EXAMINEE

The purpose of this STATEMENT OF EXAMINEE is to secure only that information which is necessary to allow for proper medical examination; the monitoring of occupational health; or as may be required by law as a condition of employment. Any deliberate false statement may be cause for disciplinary action up to and including discharge.

Every question must be answered. Date and sign consent statement when medical history form is complete.

1. Have you any condition that might require special accommodation or assistance to enable you to perform your job? No. If yes, describe.
2. Have you any condition that might put you, your co-workers, or any other persons at risk as you perform your job? No. If yes, describe.

Testimony and Medical History Form of David Couch

3. Have you ever received Workers' Compensation or disability compensation from the government, any employer, insurance company, or individual? No. If yes, when, for what condition, and for how long?
4. Have you ever had an occupational illness? No. If yes, describe condition and duration of recovery.
5. Have you ever had an occupational injury? Yes. If yes, describe condition and duration of recovery. Sprain knee, off work 3 days.
6. Have you ever had any exposure to chemicals, poisons, asbestos, or other hazardous materials, either at work, at home, or in other settings. No. If yes, give dates of exposure.

**TESTIMONY OF MONICA SLOAN
(UPS'S COMPANY NURSE)**

Q. Who did you talk to at MOHS?

A. Sherri.

(R. 168, ln. 24-25)

Q. Cherie Benwau (spelled phonetically), a nurse there?

A. Yes.

Q. What did you say and what did she say to the best of your recollection?

A. I asked if they had in fact given Vaughn a DOT card and she said yes and I said why? He didn't pass on the blood pressure readings and she said well, we didn't think he needed a DOT card. He's a mechanic and I said yes, he does need a DOT card and she said well, that was a mistake.

Q. Why does he need a DOT card to your understanding?

A. My understanding of the mechanic's job is that they have to road test vehicles as well as make road calls on broken-down vehicles and if you are driving a commercial vehicle, it is required of you to have a DOT card if that vehicle exceeds 10,001 pounds.

(R. 169, ln. 1-18)

A. I didn't fire Vaughn Murphy.

Testimony of Monica Sloan

Q. What did you do?

A. I simply told him that he did not meet the DOT regulation and that as part of his essential job functions, he must have a valid DOT card, and I know about the regulations because I'm responsible, or was responsible for approximately, probably 500 drivers and mechanics and we viewed DOT physicals virtually on a daily basis.

Q. Okay. You've reviewed the DOT regulations themselves?

A. Yes.

Q. And you are familiar with them?

A. Yes.

Q. Okay. What is the DOT requirement for blood pressure, to your understanding?

A. My understanding is it's 160 over 90.

(R. 170, ln. 7-23)

Q. (By Mr. Lowry) Nobody told you that Vaughn Murphy couldn't operate a, any motor vehicle safely, did they?

A. No one told me that he could not operate a motor vehicle safely.

(R. 172, ln. 10-14)

Testimony of Monica Sloan

Q. Do you interpret the federal regulations to require Vaughn Murphy to have a blood pressure under 160 over 90?

A. That was my understanding. That is the way I interpret it.

Q. That was my next question. Okay. And that still is your interpretation?

A. Yes, that is still my interpretation of the

(R. 172, ln. 18-25)

A. It is my belief and my understanding that that DOT card was issued in error. In my mind, it was not a valid DOT card.

(R. 174, ln. 11-13)

A. It was my understanding that his blood pressure exceeded 160 over 90 which was the minimum, well, maximum blood pressure that he could have. His blood pressure exceeded that. Therefore, I believed that the DOT card was issued in error and without a DOT card, he couldn't drive for us. Excuse me just a moment.

(R. 177, ln. 2-8)

Q. What blood pressure does Vaughn Murphy have to have to stay employed at UPS in your opinion?

A. 160 over 90.

Testimony of Monica Sloan

Q. What about the 140 over 80 or 90 number? Does he have to have blood pressure down that low?

A. No.

(R. 177, ln. 11-16)

Q. Let me hand you what's been marked as Couch Exhibit Number 6 and ask you to identify that.

A. That's the UPS medical examination form.

Q. Is that the form that you saw that caused you concern?

A. It is.

Q. And paragraph number 33, or question number 33 says BP, on page 2?

A. Correct.

Q. 186 over 124?

A. Correct.

(R. 179, ln. 4-14)

Q. Did you regard Vaughn Murphy as having an impairment, hypertension?

A. Again, I hadn't thought of blood pressure elevations in terms of impairment. I regarded him as not meeting the essential functions of the job.

Testimony of Monica Sloan

Q. And tell me what you mean by essential functions of the job.

A. That the person be DOT qualified.

(R. 180, ln. 11-18)

Q. Okay. Did you ever tell Vaughn Murphy that he had to have his blood pressure at or below 140 over 90?

A. No.

Q. So if he's testified that you told him that, that's not correct as far as you are concerned?

A. As far as I'm concerned, the blood pressure standard that we maintained at the time of Vaughn Murphy's examination would have been 160 over 90. UPS has a safety handbook that parallels the DOT regs that ideally all drivers' blood pressure is 140 over 90.

Q. Do you know if the 140 over 90 number was ever mentioned to Vaughn Murphy by you?

A. I'd have to say perhaps.

Q. But it's your testimony that you never told

(R. 385, ln. 11-25)

him that he had to have 140 over 90 to work for UPS?

A. I do not believe I said that.

Testimony of Monica Sloan

Q. Did you say anything close to that?

A. When reviewing the UPS DOT safety handbook, I may have said that to him while looking at the book.

Q. All right. Are you familiar with the DOT regs?

A. Somewhat.

Q. What training have you had, if any, in the DOT regs?

A. No specific training.

(R. 386, ln. 1-11)

Q. Okay. What is the DOT requirement for blood pressure, to your understanding?

A. My understanding is it's 160 over 90.

Q. Absolutely, no exceptions?

A. None that I'm familiar with.

(R. 387, ln. 21-25)

Q. . . . Can you identify that Exhibit 15, Doubek?

A. I don't know what you mean by identify.

Q. Can you identify it as a copy of the DOT regs?

Testimony of Monica Sloan

A. Oh, I see. Yes.

Q. It says Subpart E, Physical Qualifications and Examinations, correct?

A. Correct.

Q. Section 391.41, physical qualifications of drivers?

A. Right.

Q. Subsection B, "A person is physically qualified to drive a motor vehicle if that person," and then 1 through 13?

A. Correct.

Q. And number 6 says, "Has no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a motor vehicle safely."

A. Correct.

(R. 388, ln. 6-25)

Q. So a person could have high blood pressure then. Is that accurate?

A. Controlled high blood pressure.

Q. What's that mean?

A. Well, there's an additional section that further identifies what high blood pressure is that applies to this standard.

Testimony of Monica Sloan

Q. And what section is that? Do you know?

A. Well, I can't tell you the subpart numbers. Looks like section 391.43 under blood pressure.

Q. Okay. Are you talking about page 137 of Exhibit 15?

A. Correct.

Q. There's not 137 pages but the page that's numbered 137?

A. That's correct.

Q. Okay. What does it say under blood pressure?

A. "Record with either spring or mercury column type of sphygmomanometer. If the blood pressure is consistently above 160 over 90 millimeter mercury, further tests may be necessary to determine whether the driver is qualified to operate a motor vehicle."

Q. Okay. Neither of those sections that you've looked at says that a person absolutely has to have 160 over 90, does it?

(R. 389, ln. 1-25)

A. My understanding of the safety regulations as set out by the federal motor carriers is that physical qualifications and the physical examination given to a driver or mechanic would be minimum standards and the federal motor carriers have identified 160 over 90 as the minimum standard for blood pressure.

Testimony of Monica Sloan

Q. But neither of those sections that you've read says that it absolutely has to be under 160 over 90 in order to pass the physical, does it?

A. I don't agree with that.

(R. 390, ln. 1-10)

Q. (By Mr. Lowry) Nobody told you that Vaughn Murphy couldn't operate a, any motor vehicle safely, did they?

A. No one told me that he could not operate a motor vehicle safely.

Q. Okay. And Vaughn Murphy had a health card, didn't he?

A. Yes, he did.

Q. Do you interpret the federal regulations to require Vaughn Murphy to have a blood pressure under 160 over 90?

A. That was my understanding. That is the way I interpret it.

(R. 392, ln. 10-22)

Q. Did you ever perform a physical on Vaughn Murphy?

A. No.

Q. Did you ever take his blood pressure?

Testimony of Monica Sloan

A. No.

(R. 393, ln. 2-6)

Q. During this time, did you ever talk with

(R. 393, ln. 25)

David Couch?

A. I had a conversation with him but I don't know exactly what it was. He called me but I don't remember if it was like the 15th or when in this time frame we talked so, yes, the answer to your question is yes, I did talk with Dave Couch. I don't remember exactly when.

Q. What do you remember saying to him?

A. I asked him why he issued a DOT card in view of the fact that his, Vaughn's blood pressure exceeded the DOT regulations and UPS regulations and his understanding was that he did not need a DOT card as a mechanic.

Q. Did you tell him that the UPS regulation was 140 over 90?

A. I have a problem with that because I don't think that's correct.

Q. Why not?

A. Because I actually think it's 140 over 80.

Testimony of Monica Sloan

Q. Okay.

A. Okay, and I have not looked at that safety manual so I'm real uncomfortable saying that I told him that.

Q. Okay. Did you tell him either 140 over 90 or 140 over 80?

(R. 394, ln. 1-25)

A. Yes.

Q. And if that's what UPS required — and that's a yes?

A. Yes. I'm sorry.

Q. Sure. Did you ever make a determination as to whether it was safe for Vaughn Murphy to operate a motor vehicle safely?

A. No.

Q. Did you ever make a determination as to whether further tests should be done to determine whether he could operate a motor vehicle safely?

A. No.

Q. The only thing you saw was blood pressure in excess of 160 over 90 and said he can't work? Is that accurate?

A. He can't work without a DOT card so that

(R. 395, ln. 1-16)

**AFFIDAVIT OF RUDY ARZOLA (MR. MURPHY'S
DIRECT SUPERVISOR)**

**AFFIDAVIT OF RUDY ARZOLA IN SUPPORT OF
DEFENDANT'S SUMMARY JUDGMENT MOTION**

Rudy Arzola, being first duly sworn, states as follows:

1. I am an Automotive Supervisor for United Parcel Service. My office is in Lenexa, Kansas.
2. I am familiar with the regulations promulgated by the United States Department of Transportation and their definition of a "commercial motor vehicle."
3. Under DOT regulations, any vehicle with a gross weight rating of 10,001 or more pounds is considered a "commercial motor vehicle."
4. UPS package cars have a gross weight rating of 12,000 to 20,000 pounds. UPS tractor trailers have a gross weight rating of 55,000 pounds.
5. As part of his job duties as a mechanic for UPS, Vaughn Murphy was expected to be able to drive both package cars and tractor trailers to perform "road tests" and "road calls" and such driving was considered to be an essential function of his job.
6. A "road test" is when a mechanic takes the vehicle he is working on out on the road to diagnose the problem or determine if the previously diagnosed problem has been fixed. A "road call" is when a mechanic delivers an operating vehicle to a driver whose vehicle has broken down, fixes the broken vehicle, and drives it

Affidavit of Rudy Arzola

back to the facility. Sometimes there will be packages on board this vehicle the mechanic is driving and these packages are traveling in interstate commerce.

7. Working on the night shift in Topeka, Murphy would primarily be performing road calls on tractor trailers and road tests on package cars.
8. All of the vehicles which Murphy worked on were "commercial motor vehicle."

(Record 79-80)

**AFFIDAVIT AND TESTIMONY OF JOHN R. MCMAHON
(UPS'S HUMAN RESOURCES MANAGER)****AFFIDAVIT OF JOHN R. McMAHON IN SUPPORT OF
DEFENDANT'S SUMMARY JUDGMENT MOTION**

John R. McMahon, being first duly sworn, states as follows:

1. I am the Manager of Human Resources for United Parcel Service, Inc.'s, Kansas District which encompasses the entire state of Kansas. My office is in Lenexa, Kansas.
2. Attached to this affidavit as Exhibit No. 1 is a true and correct copy of the Medical Regulatory Criteria for Evaluation Under Section 391.41(b)(6), revised September 1988, which addresses the question under Section 391.41(b)(6) of whether an individual has a current clinical diagnosis of high blood pressure that is likely to interfere with his or her ability to operate a motor vehicle and when further tests may be necessary.

(Record 82-83)

*Affidavit and Testimony of John R. McMahon***MEDICAL REGULATORY CRITERIA FOR EVALUATION UNDER SECTION 391.41(B)(6)**

* * * Whether an individual has a current clinical diagnosis of high blood pressure likely to interfere with a driver's ability to operate a motor vehicle.

Hypertension alone is unlikely to cause sudden collapse; however, the likelihood increases when target organ damage, particularly cerebral vascular disease, is present. Most commercial drivers with hypertension are not immediately unqualified to operate a commercial motor vehicle in interstate commerce. This regulatory criteria is based on the OMC's Cardiac Conference recommendations, which used the report of the 1984 Joint National Committee on Detection, Evaluation, and Treatment of High Blood Pressure as its starting point.

Mild Hypertension:

Initial blood pressure of 161-180 systolic and/or 91-104 diastolic is considered mild hypertension, and the driver need not be found unqualified during evaluation and institution of treatment.

1. The driver is given one 3-month period to reduce his or her blood pressure to less than or equal to 160/90; the certifying physician should state on the medical certificate that it is only valid for that one 3-month period.
2. If at any time during or by the end of this 3-month period the driver is found qualified with a blood pressure less than or equal to 160/90, the certifying physician may issue a medical certificate for a 1-year period but must confirm

Affidavit and Testimony of John R. McMahon

blood pressure control in the third month of this 1-year period.

3. The individual should be certified annually thereafter. The expiration date must be stated on the medical certificate.

Moderate to Severe Hypertension:

Initial blood pressure of greater than 180 systolic and/or greater than 104 diastolic is considered moderate to severe. *The driver may not be qualified, even temporarily*, until his or her blood pressure has been reduced to less than 181/105. Once the individual's blood pressure is below 181 and/or 105, the examining physician may temporarily certify the individual for one 3-month period as for mild hypertension:

1. The driver is given one 3-month period to reduce his or her blood pressure to less than or equal to 160/90; the certifying physician should state on the medical certificate that it is only valid for that 3-month period.
2. If at any time during or by the end of this 3-month period the driver is found qualified with a blood pressure less than or equal to 160/90, the certifying physician may issue a medical certificate for a 6-month period but must confirm blood pressure control in the third month.
3. For initial blood pressure greater than 180 and/or 104, documentation of continued control and recertification should be made every 6 months. The expiration date must be stated on the medical certificate.

The initial blood pressure finding should be confirmed by at least two subsequent measurements on different days. Blood

Affidavit and Testimony of John R. McMahon

pressure measurement should be made with the subject seated comfortably and relaxed. Systolic and diastolic pressures should be recorded, with the diastolic pressure reported as the disappearance of sound (phase V). Upper arm constriction by a rolled sleeve should be avoided. Large-sized arm cuffs should be available for use in subjects whose arm girth is larger than normal.

Evaluation of the hypertensive commercial driver should consist of a search for additional risk factors and evidence of target organ damage. Inquiry should be made regarding smoking, cardiovascular disease in relatives, and immoderate use of alcohol. An electrocardiogram (ECG) and blood profile, including glucose, cholesterol, HDL cholesterol, creatinine and potassium, should be made. An echocardiogram and chest x-ray are desirable in subjects with moderate or severe hypertension.

Since the presence of target organ damage increases the risk of sudden collapse, group 3 or 4 hypertensive retinopathy, left ventricular hypertrophy not otherwise explained (echocardiography or ECG by Estes criteria), evidence of severely reduced left ventricular function, or serum creatinine of greater than 2.5 warrants the driver being found unqualified to operate commercial motor vehicle in interstate commerce.

Treatment includes nonpharmacologic and pharmacologic modalities as outlined by the Joint National Committee, as well as counseling to reduce other risk factors. Most antihypertensive medications also have side effects, the importance of which must be judged on an individual basis. Side effects of somnolence or syncope are particularly undesirable in commercial drivers. Commercial drivers should be informed

Affidavit and Testimony of John R. McMahon

of the side effects of drug therapy and the interaction of their drugs with other prescription drugs, nonprescription drugs, and alcohol.

Surgically Corrected Hypertension:

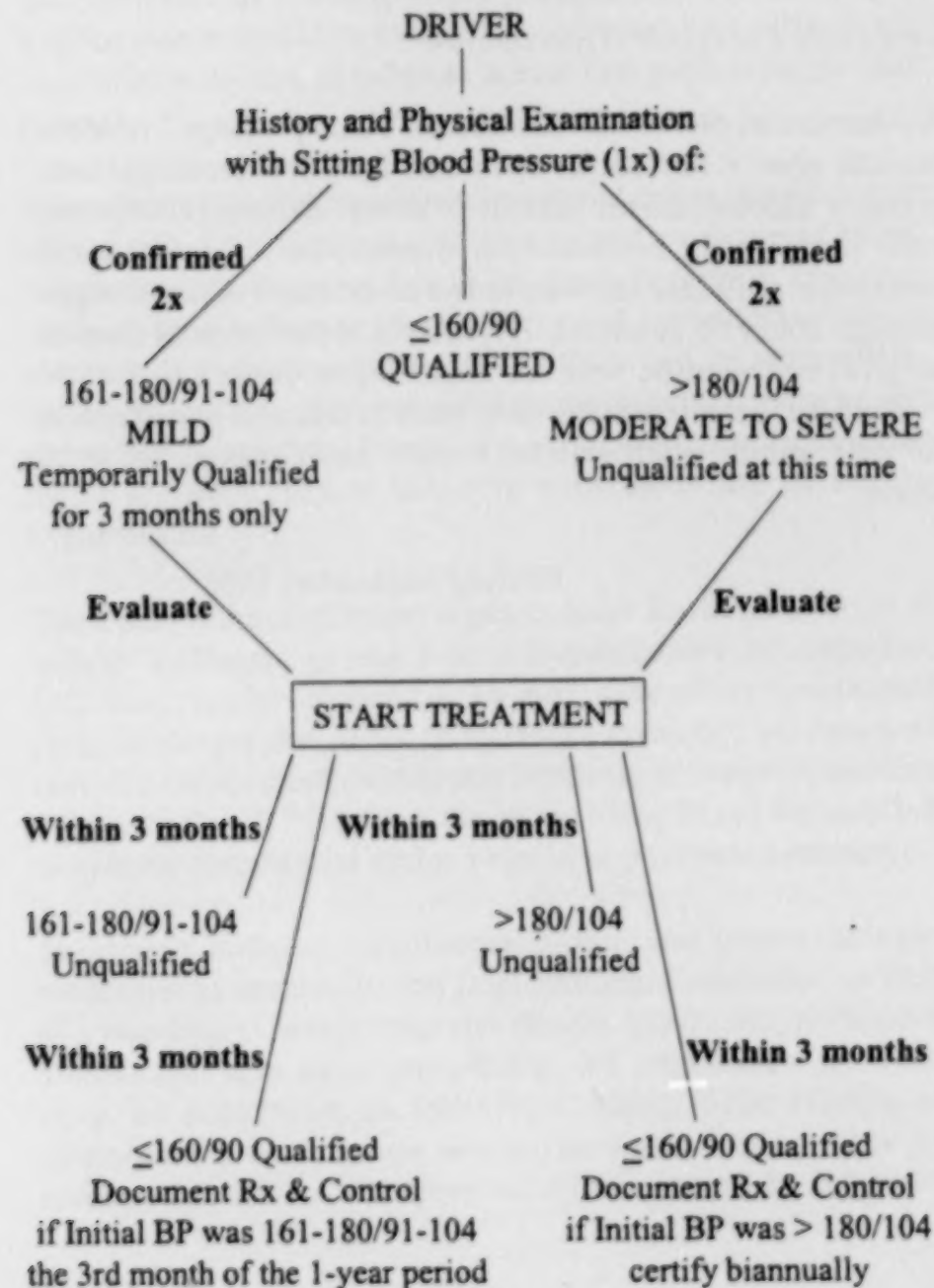
A commercial driver who has normal blood pressure 3 or more months after a successful operation for pheochromocytoma, primary aldosteronism (unless bilateral adrenalectomy has been performed), renovascular disease, or unilateral renal parenchymal disease and who shows no evidence of target organ damage could be qualified. Hypertension that persists despite surgical intervention with no target organ disease should be evaluated and treated on the same basis as essential hypertension for determining qualification. Follow guidelines as set forth above.

Revised September 1988

Affidavit and Testimony of John R. McMahon

HYPERTENSION CHART

HYPERTENSION



Affidavit and Testimony of John R. McMahon

TESTIMONY OF JOHN R. McMAHON

(Record 85-88)

Q. What information did you have when you made your decision to fire him?

A. The medical information provided to me by Monica.

Q. Anything else?

A. No.

Q. Did you have his personnel file?

A. I may have but I don't remember.

Q. What's the reason why he was fired?

A. The reason was that Mr. Murphy did not meet the requirements of the Department of Transportation.

Q. What requirements of the Department of Transportation did he fail to meet in your opinion?

A. He could not meet the requirement of the blood pressure requirement, minimal acceptable requirement.

Q. What's that?

A. I believe it's 160 over 90.

Affidavit and Testimony of John R. McMahon

Q. And what are you relying on to, what did you rely on as information that Vaughn couldn't or didn't meet the DOT requirements?

(R. 158, ln. 5-25)

A. The information provided by the people with the medical expertise that determined whether he could or couldn't.

(R. 159, ln. 1-3)

Q. What I'm trying to find out is did Monica Sloan tell you that he didn't meet DOT requirements, did the forms tell you that, because the record is that Vaughn had a DOT health card, correct? Did you know that?

A. I know he had a card. I know it wasn't valid.

Q. How do you know it wasn't valid?

A. Because he didn't meet the DOT requirements.

(R. 159, ln. 6-14)

Q. Did you consider Vaughn Murphy as disabled because of his high blood pressure?

A. Well, let me ask you, when you are saying disabled, disabled in what way? Disabled as unable to —

Q. This is a question as to, as unable to drive a truck.

Affidavit and Testimony of John R. McMahon

A. I considered him not to be acceptable based on the requirement of the Department of Transportation.

Q. Did you consider him to be disabled and unable to drive a truck because of his high blood pressure? Yes or no.

A. If it was his own truck, no.

Q. What if it was UPS's truck?

A. Then yes, I did consider him to be not acceptable to operate the vehicle for us.

Q. Because of his high blood pressure?

A. That's correct.

(R. 160, ln. 4-21)

**TESTIMONY OF ROBERT BROWN, M.D. (UPS'S
DESIGNATED PHYSICIAN EXPERT)**

Q. Have you ever to the best of your recollection denied someone a DOT medical card for high blood pressure before?

A. Yes.

Q. Do you do DOT physicals for UPS?

A. Yes.

(R. 133, ln. 1-6)

A. He went and after having a conditional offer of employment from UPS went to have a DOT examination on 8-16-94 by David Couch and in the course of that examination had a blood pressure of 186 over 124 which would by DOT guidelines make him unqualified until his blood pressure was brought down. And he was incorrectly given a DOT card at that time. The physical was later reviewed by Monica Sloan. The problem with the blood pressure was found and he went back, had another physical, I believe, and ended up failing. In any case, ended up failing. And consequently, although he had been working for some time, he was found DOT unqualified and was not working until he was DOT qualified which I guess is never.

Q. What's your understanding of the proper procedure for qualifying someone under the DOT for drivers?

A. With regard to blood pressure.

Testimony of Robert Brown, M.D.

Q. Yes.

A. The blood pressure when it's initially taken, if it is less than or equal to 160 over 90, then they pass. If it is between 161 — greater than 160 over 90 but less than 181 over 105, then it is up to the doctor's discretion as to whether or not they'd be qualified for a period of three months. And after — or if they are in excess of 180 over 104, then they are not qualified until their blood pressure is below 161 — well, less than or equal to 160 over 90.

(R. 134, ln. 1-25)

Q. Were DOT regulations followed in the examination and testing of Vaughn Murphy's blood pressure in your opinion?

A. No.

Q. Why not?

A. Because he should have been disqualified on his initial exam and not qualified until his blood pressure was less than or equal to 160 over 90.

(R. 135, ln. 1-8)

Q. Okay. By physical impairment, I mean a physiological disorder or condition affecting one of the major systems of the body, like the cardiovascular system?

A. I would say that it is.

Testimony of Robert Brown, M.D.

Q. Does his high blood pressure significantly restrict him as to the condition, manner or duration in which he can perform major life activities or activities of daily living as compared to the average person?

A. Not yet.

(R. 136, ln. 1-9)

Q. Can he walk like the average person could without high blood pressure?

(R. 136, ln. 20-21)

A. Yeah, I think so.

(R. 136, ln. 25)

Q. (BY MR. LOWRY) Can he lift the same as what an average person could?

A. I don't know what the number would be for an average person. I suspect if you actually take everybody and average them, he probably can lift better than them because he's a big guy. You know, I'm not sure how to answer that. I certainly would have some concerns about him doing that.

Q. Does his high blood pressure restrict him in work?

A. Only with regard to DOT certification.

(R. 137, ln. 1-9)

Testimony of Robert Brown, M.D.

Q. What is the DOT physical qualification for drivers for blood pressure?

A. They are supposed to be less than or equal to 160 over 90.

Q. Is that number absolute?

A. No. They can be certified one time for a period of three months if their initial blood pressure is in excess of 160 over 90 but less than 181 over 105.

(R. 139, ln. 17-24)

Q. And if Vaughn — the regulation says if he had blood pressure under 180 over 104?

A. Initially.

Q. Initially, then he gets a temporary card?

A. No. It says he can get a temporary card. It's up to the physician's discretion on that.

Q. Would you have given him a three-month card?

A. If I had his records, I would not.

Q. Why not?

A. Because he hasn't been able to maintain it below that. It has to be reasonable that he will attain it. Unfortunately, his history shows that that's not the case.

Testimony of Robert Brown, M.D.

Q. It's been below 180 over 104?

A. That's not the point. After three months, you have to be below 160 over 90 — equal to or below 160 over 90 and that's not something he's been able to do. So for that reason I wouldn't have given it to him if I knew all this information. If he came in, I would ask him about his hypertension, and if he told me that he was unable to keep his blood pressure in that range because of side effects, then I would not have given it to him.

(R. 144, ln. 1-21)

Q. Paragraph No. 2 under hypertension says if at any time during or by the end of this three-month period, the BP, blood pressure, is found to be less than or equal to 160 over 90 a medical certificate may be issued for a one-year period, correct?

A. That's correct.

Q. So if he hits 160 over 90 one time, he can get — he can keep that three-month card, correct?

A. Yeah. He would be eligible for getting a three-month card. If it looked like that's something that could be done and if he succeeded in doing it, he could get a one-year card.

Q. Right. It goes on to say it must be confirmed in the third month of the one-year period?

A. That's correct.

Testimony of Robert Brown, M.D.

Q. So he'd have to go back again and he's to have it 160 or 90?

A. That's what's supposed to happen.

Q. That didn't happen with Vaughn Murphy?

A. Not very much, correct, happened with Vaughn Murphy. He first off shouldn't have been certified in the first place and secondly shouldn't have an opportunity for a three-month card — or shouldn't have an opportunity to be certified until his blood pressure was less than or equal to 160 over 90.

(R. 145, ln. 1-25)

A. Not very much, correct, happened with Vaughn Murphy. He first off shouldn't have been certified in the first place and secondly shouldn't have an opportunity for a three-month card — or shouldn't have an opportunity to be certified until his blood pressure was less than or equal to 160 over 90.

(R. 145, ln. 20-25)

**TESTIMONY AND REPORT OF LEWIS VIERLING
(UPS'S DESIGNATED VOCATIONAL EXPERT)**

TESTIMONY OF LEWIS VIERLING

Q. Does Vaughn Murphy's high blood pressure limit his ability to work or obtain jobs in the open labor market in your opinion?

A. Generally speaking, no.

Q. Why not?

A. Because it's a fairly common medical condition and as such, if normally treated by medication, doesn't interfere with the person's ability to function, work or function.

(R. 183, ln. 6-14)

Q. All right. Now, if they have put or recommended restrictions on Vaughn Murphy, wouldn't that restrict his ability to get jobs in the open labor market?

A. I would really have to see what those restrictions are before I could answer that.

Q. For example, say he's restricted out of very heavy work, would that restrict him out of a broad class of jobs?

A. No.

Q. Why not?

Testimony and Report of Lewis Vierling

A. Because very heavy work is not a broad, there are not a large number of people doing very heavy work. It's a very small category.

Q. How many people are doing very heavy work?

A. I can't tell you that, but I can tell you that statistically, very heavy work is a very small part of the overall pie.

(R. 184, ln. 4-21)

*Testimony and Report of Lewis Vierling***REPORT OF LEWIS VIERLING**

VOCATIONAL EVALUATION — Vaughn L. Murphy, II — by Lewis E. Vierling, MS, CHCM, CRC, CCM, Vice President/Rehabilitation Consultant")

(R. 185)

WORK PROFILE

From a total of 2,500 of the most prevalent jobs, those in which 93% of all workers are employed, a work profile was obtained. The total number of jobs in the profile was arrived at by using Mr. Murphy's work history as previously identified and enumerated in this report. The second category is for closely-related occupations which includes, as its base of comparison, all 12,741 occupations listed in the *Dictionary of Occupational Titles*.

Realistic Alternatives — The Work Profile includes 742 occupations in which Mr. Murphy could enter with some re-training.

Closely-Related — The Work Profile includes 8,144 occupations in which Mr. Murphy could enter with little or no training.

Transferable Skills Analysis

This consultant performed a Transferable Skills Analysis (TSA) based upon Mr. Murphy's education, work history, and accumulated worker traits. These worker traits included the previously identified worker functions as well as temperaments

Testimony and Report of Lewis Vierling

and stress-related demands. As noted above, two analysis were performed, one involving a search for Realistic Alternatives and the other for Closely-Related occupations. In addition, the alternatives identified are scored based upon a "goodness-of-fit concept." A score is computed for each occupation indicating how closely the occupations match the profile of the client. Ten high-scoring occupations out of a total of 60 scored in both groups are as follows:

DOT #620.281-050, *Mechanic-Industrial Truck*

DOT #625.281-010, *Diesel Mechanic*

DOT #626.381-014, *Gas-Welding-Equipment Mechanic*

DOT #620.281-010, *Automotive-Mechanic-Equipment Service*

DOT #625.281-026, *Gas-Engine Repairer*

The following are examples of Closely-Related occupations:

DOT #183.167-030, *Service Supervisor-Leased Machinery*

DOT #609.462.010, *Balancing-Machine Operator*

DOT #638.261-030, *Machine Repairer, Maintenance*

DOT #625.281.022, *Fuel-Engine Servicer*

DOT #625.281.034, *Small-Engine Mechanic*

*Testimony and Report of Lewis Vierling**LABOR MARKET INFORMATION**Wage/Salary Information:*

The following information is being provided as wage/salary estimates for employment in Mr. Murphy's usual and customary work:

Estimated Median Wage

DOT #620.281-050,		
Mechanic —	starting salary	\$21,159
	3 years of experience	\$24,456
	6 years of experience	\$27,890

DOT #625.281-010,		
Diesel Mechanic —	starting salary	\$19,655
	6 years of experience	\$25,252
	12 years of experience	\$29,084

SUMMARY/OPINIONS

Mr. Murphy has demonstrated through his specialized training, education and experience that he is capable of earning \$25,000 per year or \$12.00 per hour. His usual and customary work is in the area of mechanic and diesel engine repairer. While this is a highly specialized area, there is on-going demand for individuals with this type of training and experience.

(189-191, Vierling Report)

TESTIMONY OF ROBERT KING (UPS EMPLOYEE)

Q. Why do mechanics have to have health cards?

A. Because mechanics have to, as I said, go on breakdowns and there are occasions when packages are on the vehicles and we will be driving them and filing packages as interstate commerce, that type of thing.

(R. 155, ln. 8-12)

ESSENTIAL JOB FUNCTIONS — AUTOMOTIVE MECHANIC

Essential Job Functions Automotive Mechanic

Overview:

Works with various tool to repair vehicles and machinery. Must meet D.O.T. Requirements and be CDL qualified as required by job assignment.

Essential Functions: must be able to:

- Bend, stoop, squat, kneel, crawl, climb ladders and stairs, stand, walk and turn/pivot frequently throughout the duration of the workday
 - Part time - 3-5 hours per day, 5 days per week
 - Full-time - 8-9 hours per day, 5 days per week
- Sitting required infrequently throughout the duration of the workday
- Lift, lower, push, pull and carry equipment and/or parts up to and possibly greater than 70 pounds to assigned work area
- Simple hand grasping, power hand grasping, fine hand manipulation, reaching foot to shoulder and above necessary to complete assigned tasks
- Operate standard transmission
- To work in an environment that will contain:
 - variable temperatures and humidity (climatic conditions)
 - exposure to cleaning materials, petroleum, products, dust, dirt, and noise
 - outside inclement weather

Essential Job Functions

- Demonstrate cognitive ability to:
 - follow directions and routines
 - work independently with appropriate judgment
 - illustrate spatial awareness
 - read, write and comprehend numbers and decimal number systems
 - concentrate, memorize, and recollect
 - identify logical connections and determine sequence of response
 - processing up to 2-3 steps ahead
- Operate power, pneumatic hand tools
- Other functions that may be assigned

The essential functions of this position include, but may not be limited to those listed above. UPS retains the discretion to modify the duties of the position at any time.

FINAL PRETRIAL ORDER DATED SEPTEMBER 5, 1996***Final Pretrial Order***

(Record 14)

5. Stipulations

- a. At all material times, Plaintiff's blood pressure was above 160/90.
- b. Meeting DOT requirements is listed as essential function of the job.

(Record 21)

IT IS SO ORDERED, and this Pretrial Order shall supersede pleadings and control the future course of the action unless modified to prevent manifest injustice.

Dated at Topeka, Kansas, this 5th day of September, 1996.

/s/ Sam Crow
UNITED STATES DISTRICT JUDGE

(Record 24)

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT****I. INTRODUCTION**

This lawsuit under the Americans With Disabilities Act ("ADA") arises out of plaintiff's termination of employment with defendant United Parcel Service, Inc. ("UPS"). Plaintiff was employed as a mechanic for five weeks. He was terminated after UPS learned that his blood pressure exceeded the physical qualification standard established by the United States Department of Transportation for persons who drive commercial motor vehicles.

The grounds for this motion are: (1) plaintiff does not have a "disability" as defined by the ADA because the uncontroverted evidence establishes that plaintiff's high blood pressure ("hypertension") does not substantially limit any major life activity; and (2) even if one assumes plaintiff's hypertension is a disability, he is not a "qualified individual with a disability" under the ADA because the uncontroverted evidence establishes the following:

- A. Driving commercial motor vehicles is an essential job function of plaintiff's position as a mechanic for UPS.
- B. DOT regulations require an employee who drives a commercial motor vehicle to be "physically qualified."
- C. In order to be "physically qualified" under DOT regulations, the employee must be able to maintain a blood pressure of 160/90 or below.
- D. Plaintiff's blood pressure has been above 160/90 at all material times.

Defendant's Memorandum

- E. Plaintiff demanded accommodation that UPS allow him to work while he tried to get a "waiver" of the DOT standard and tried to get his blood pressure down to meet the DOT standard is not reasonable accommodation under the ADA.

II. LOCAL RULE 56.1 STATEMENT OF UNCONTESTED MATERIAL FACTS

A. Uncontroverted Facts Establishing Plaintiff Does Not Have a "Disability" Under the ADA.

1. Plaintiff has had high blood pressure ("hypertension") since he was 10 years old. (Murphy Dep., p. 7)
2. Plaintiff has never had a doctor place any work restrictions on him because of his hypertension. (Murphy Dep., p. 169)
3. For over 22 years, plaintiff has performed mechanic jobs that did not require DOT certification without any limitation resulting from his hypertension other than the self-imposed restriction of using a lever to lift heavy objects and not running to answer the telephone. (Murphy Dep., pp. 30-33)
4. Plaintiff's hypertension has not had any effect on his non-work activities other than not being able to mow the yard with a push mower and not playing activity sports such as baseball and basketball. (Murphy Dep., p. 20-22)
5. Plaintiff's treating doctor, Dr. Debra Doubek, testified that plaintiff "functions normally doing everyday

Defendant's Memorandum

- activity that an everyday person does." (Doubek Dep., p. 29)
6. Plaintiff's hypertension does not have any effect on his everyday activity. (Doubek Dep., p. 29)
 7. The only limitation Dr. Doubek may place on plaintiff is that he not hold a job requiring repetitive lifting of 200 pounds. (Doubek Dep., p. 13)
 8. UPS's expert medical witness, Dr. Robert R. Brown, testified that plaintiff's hypertension does not significantly restrict him as to the condition, manner, or duration in which he can perform major life activities or activities of daily living as compared to the average person. (Brown Dep., p. 29)
 9. Brown testified that plaintiff should only be restricted from very heavy lifting on a very frequent basis. (Brown Dep., p. 31)
 10. UPS's vocational rehabilitation expert, Lewis Vierling, testified that plaintiff's high blood pressure does not limit his ability to work or obtain jobs in the open labor market. (Vierling Dep., p. 28)
 11. David Couch, the nurse who performed the DOT physical on plaintiff, testified that plaintiff's hypertension does not effect his activities of daily living. (Couch Dep., p. 37)

*Defendant's Memorandum***B. Uncontroverted Facts Establishing Plaintiff is Not a "Qualified Individual with a Disability" Under the ADA.**

12. In early August 1994, plaintiff applied for a position as a mechanic at UPS. (Murphy Dep., p. 41)
13. Plaintiff knew that driving would be part of his job duties as a UPS mechanic. (Murphy Dep., p. 87, 163)
14. When plaintiff filled out his application for employment at UPS, in addition to knowing that driving would be a required part of his job, he also knew that a condition of his employment would be taking and passing a DOT physical and obtaining a DOT health card. (Murphy Dep., p. 55)
15. Plaintiff was hired by UPS as a mechanic at the Topeka facility and began working on August 18, 1994. (Murphy Dep., pp. 85-86)
16. The UPS job description for mechanic states that the essential functions include a commercial driver's license, meeting DOT regulations, and operating a standard transmission. (See Stipulation in Pretrial Order; King Dep., p. 10; Sloan Dep., p. 55)
17. DOT regulations define a "commercial motor vehicle" as follows:

... any self-propelled or towed motor vehicle used on public highways in interstate commerce to transport passengers

Defendant's Memorandum

or property when: (a) The motor vehicle has a gross weight rating of 10,001 or more pounds . . .

49 C.F.R. § 390.5.

18. UPS considers driving commercial motor vehicles an essential function of plaintiff's job as mechanic. (Arzola Dep., p. 16; King Dep., p. 8-10)
19. As a mechanic, plaintiff drove UPS vehicles with gross weight ratings of 10,001 or more pounds as specified in the DOT definition of commercial motor vehicle. (Arzola Aff'd. ¶ 5)
20. Plaintiff and other UPS mechanics were expected and required to drive tractor trailers and package cars. A tractor trailer has a gross weight rating of 55,000 pounds. A package car has a gross weight rating of 12,000 to 20,000 pounds. (Arzola Aff'd. ¶'s 4 & 5).
21. Plaintiff and other UPS mechanics were expected and required to drive tractor trailers and package cars to perform "road tests" and "road calls." (Murphy Dep., p. 88-89; Arzola Aff'd. ¶ 5; Arzola Dep., pp. 13, 21, 43; King Dep., pp. 8-9; Sloan Dep., p. 14)
22. A "road test" is when a mechanic takes the vehicle he is working on out on the road to diagnose the problem or determine if the previously diagnosed problem has been fixed. A "road call" is when a mechanic has to deliver an operating vehicle to a driver whose package car has broken down, fix the broken vehicle, and drive

Defendant's Memorandum

it back to the facility, sometimes with packages on board that are traveling in interstate commerce. (Murphy Dep., p. 88-89; Arzola Dep., pp. 13, 21, 43; King Dep., pp. 8-9; Sloan Dep., p. 14; Arzola Aff'd. ¶ 6)

23. During the five weeks plaintiff worked at UPS, he performed road tests on UPS vehicles between 12 and 18 times. (Murphy Dep., p. 164)
24. Working on the night shift in Topeka, plaintiff's driving of a commercial motor vehicle would primarily be performing road calls on tractor trailers and road tests on package cars. (Arzola Aff'd. ¶ 7)
25. All of the vehicles which plaintiff worked on were commercial motor vehicles. (Arzola Aff'd. ¶ 8)
26. There were times when plaintiff was the only mechanic on duty in Topeka and the only employee available to perform road tests or road calls. (Murphy Dep., pp. 89 & 171; Arzola Dep., pp. 19, 23-24)
27. UPS expected plaintiff and other mechanics to be able to drive commercial motor vehicles on every shift they worked. (Arzola Dep., p. 21)
28. DOT regulations require that a driver of a commercial motor vehicle must be "physically qualified" and have a medical examiner's certificate. The regulations provide as follows with respect to high blood pressure:

- (a) A person shall not drive a commercial motor vehicle unless he/she is

Defendant's Memorandum

physically qualified to do so and . . . has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

- (b) A person is physically qualified to drive a commercial motor vehicle if that person . . .

- (6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.

49 C.F.R. § 391.41.

29. In September, 1988, the DOT issued the *Medical Regulatory Criteria for Evaluation [of High Blood Pressure] Under Section 391.41(b)(6)*, which addresses the question under Section 391.41(b)(6) of whether an individual has a current clinical diagnosis of high blood pressure that is likely to interfere with a driver's ability to operate a motor vehicle and when further tests may be necessary. (McMahon Aff'd. ¶ 2; Brown Dep., pp. 35-37, 40, 45-47)
30. The DOT *Medical Regulatory Criteria for Evaluation* provides that in order to be physically qualified to drive a commercial motor vehicle, other than a temporary

Defendant's Memorandum

three month certification for evaluation and treatment of mild hypertension (from 161/91 to 180/104), an individual must maintain blood pressure less than or equal to 160/90. (Brown Dep., pp. 9, 19, 35, 37, 46-47; McMahon Dep., pp. 7-8; Sloan Dep., pp. 15, 18, 20, 23-25, 34, & 40; Murphy Dep., pp. 109, 119, & 121)

31. Plaintiff's blood pressure at all relevant times was above the 160/90 standard established in the DOT *Medical Regulatory Criteria for Evaluation*. (See Stipulation in Pretrial Order)
32. Plaintiff's treating doctor testified that plaintiff will never be able to qualify for a job that requires a blood pressure reading of 160/90 or below. (Doubek Dep., p. 29)
33. Plaintiff is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep, irritability, rage, and contempt for people. (Murphy Dep., pp. 18-19)
34. Dr. Doubek testified that Plaintiff would "not be able to function" if he took medication to get his blood pressure below 160/90. (Doubek Dep., p. 23)
35. Vernon Wenger, transportation manager for the Kansas Corporation Commission, who is responsible for regulation of motor common carriers, testified that a mechanic who has driving responsibilities is required to have a DOT health card. (Wenger Dep., pp. 14, 18, 27)

Defendant's Memorandum

36. UPS requires all mechanics to take a DOT physical and secure a DOT health card prior to starting work. (Arzola Dep., pp. 22, 30, & 36; Mott Dep., p. 20, 53-54)
37. Other than the position at UPS, plaintiff has never been required to obtain DOT certification for any other job. (Murphy Dep., p. 26, 31-34)
38. On August 16, 1994, when plaintiff took his DOT physical, his blood pressure was 186/124. (Murphy Dep., pp. 74-75; Sloan Dep., p. 42)
39. Despite plaintiff's elevated blood pressure, he was issued a DOT health card by the testing clinic on August 16, 1994. (Murphy Dep., p. 80)
40. Plaintiff should have been disqualified on his initial exam and not issued a DOT health card. (Brown Dep., p. 20)
41. On September 15, 1994, while reviewing medical records, Monica Sloan, UPS Medical Services Supervisor, discovered that plaintiff's blood pressure was above the DOT standard and that his DOT health Card had been issued in error. (Sloan Dep., pp. 11-14)
42. On September 26, 1994, plaintiff's blood pressure was retested twice, and his blood pressure readings were 160/102 and 164/104, still above the DOT standard of 160/90. (Sloan Dep., p. 28; Murphy Dep., p. 117)
43. Plaintiff was terminated on or about October 5, 1994. (Complaint ¶ 4)

Defendant's Memorandum

44. Plaintiff did not request any accommodation other than requesting a waiver and time to get his blood pressure within the DOT standards. (Murphy Dep., pp. 165-167)
45. Federal DOT regulations do not allow the blood pressure standard to be waived. (Wenger Dep., pp. 25-26)
46. Plaintiff secured a mechanic job with Car Clinic approximately two weeks after his termination from UPS. The job did not require DOT certification and plaintiff currently remains employed with Car Clinic. (Murphy Dep., p. 139)

(Record 49-56)

**PLAINTIFF VAUGHN L. MURPHY'S RESPONSE
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

(R. 291)

* * *

Defendant's Memorandum

**II. RESPONSE TO DEFENDANT'S STATEMENT OF
UNCONTESTED MATERIAL FACTS**

**A. There are Genuine Issues of Material Fact whether
Vaughn Murphy has a Disability.**

1. Plaintiff has had high blood pressure since age 10. Uncontroverted.
2. Plaintiff has never had a doctor place any work restrictions on him because of his hypertension. Controverted. He has never been given any formal restrictions. He has been told by his doctor not to "exert on heavy items." (Vaughn Murphy Depo., p. 169, ln. 17 and 18)
3. For over 22 years, Plaintiff has performed mechanic jobs that did not require DOT certification without any limitation resulting from his hypertension other than the self-imposed restriction of using a lever to lift heavy objects and not running to answer the telephone. Controverted. The deposition question was not closed. Mr. Murphy's response was not exhaustive. Vaughn Murphy also testified that he cannot work over his head for long periods of time (Vaughn Murphy Depo., p. 23, ln. 7-9); the medication gives him gout which can be crippling and cause him to be in bed or a week to ten days (Vaughn Murphy Depo., p. 23, ln. 1-3); using a cart for heavy items (Murphy Depo., p. 29, ln. 18-p. 30, ln. 8), and he cannot do very heavy or heavy work (Murphy Depo., p. 161 and 162).

Defendant's Memorandum

4. Plaintiff's hypertension has not had any affect on his non-work activities other than not being able to mow the yard with a push mower and not playing activity sports such as baseball and basketball. Controverted. First of all, the questions assume that he is medicated. The regulations make it clear that the existence of an impairment is to be determined without regard to mitigating measures such as medicines or assistive or prosthetic devices. (See ¶ 2, Interpretative Guidance to 29 C.F.R. 630.2(h) and Senate Report at 23, House and Labor Report at 52, House Judiciary report at 28). Secondly, the question was not asked as an exhaustive question. He also testified how the medication could give him gout which could be crippling and put him in bed for a week to ten days. (Murphy Depo., p. 23, ln. 1-4). His medicated hypertension all substantially permits his ability to run, lift, eat, exercise, breath, hear and see. (Murphy Depo., pp. 159, 160 and 161).
5. Plaintiff's treating doctor, Dr. Debra Doubek, testified that plaintiff functions normally doing every day activity that an everyday person does. This is not a statement of uncontroverted fact. Stating that a person testified in one manner or another does not make an issue an uncontroverted statement of fact. It is controverted that Vaughn Murphy can function normally as everyone else does in the activities of daily living. It's controverted by the above statements of fact.
6. Plaintiff's hypertension does not have any affect on his everyday activity. Controverted. See above statements of fact from Vaughn Murphy's deposition.

Defendant's Memorandum

- Dr. Debra Doubek also testified that Vaughn Murphy had severe high blood pressure. She said severe high blood pressure can end organ damage such as retinal hemorrhages, retinal damage, kidney damage and heart damage. (Debra Doubek Depo., p. 9, ln. 1)
7. The only limitation Dr. Doubek may place on Plaintiff is that he not hold a job requiring repetitive lifting of 200 pounds. Controverted. She also agreed that he should be limited from very heavy or heavy work. (Doubek Depo., p. 13, ln. 25-p. 14, ln. 1)
 8. UPS's expert medical witness, Dr. Robert R. Brown, testified that Plaintiff's hypertension does not significantly restrict him as to the condition, manner or duration in which he can perform major life activities or activities of daily living as compared to the average person. Controverted. Whether Dr. Brown testified to something does not make the issue one of uncontroverted fact. As stated above there is clear evidence controverting he affects of his hypertension on his major life activities and work. Also, Dr. Brown said "Not yet" about restrictions. Also, he was not asked whether there would be any difference if he was unmedicated.
 9. Dr. Brown testified that Plaintiff should only be restricted from very heavy lifting on a very frequent basis. Once again this is not a statement of uncontroverted fact. The form of the statement is objected to as above. Assuming the statement of fact would be that Vaughn Murphy is only restricted from very heavy lifting on a frequent basis. That statement

Defendant's Memorandum

is controverted. Vaughn Murphy has testified that he should be limited from very heavy and heavy work. (Murphy Depo., pp. 161 and 162) David Couch restricted him from anything over medium which could be very heavy and heavy work. (Couch Depo., p. 39, ln. 15-p. 40, ln. 25) Dr. Doubek restricted him out of very heavy and heavy work also. (Doubek Depo., p. 13, ln. 18-p. 14, ln. 1)

10. UPS's vocational rehabilitation expert, Louis Vierling, testified that Plaintiff's high blood pressure does not limit his ability to work obtain jobs in the open labor market. Controverted. Objection, not a statement of fact in proper form. It is clearly controverted, as stated above, because he is restricted out of very heavy and heavy classes of work.
11. David Couch, the nurse who performed the DOT physical on Plaintiff testified that Plaintiff's hypertension does not affect his activities of daily living. Controverted. Objection, not a statement of fact in proper form. It is not controverted that David Couch made that statement. It is, of course, controverted that hypertension affects his activities of daily living through the statements of fact cited above.

Plaintiff also offers the following statements of fact that show that he has a disability. Having a disability means he has a physical impairment that substantially limits major life activities.

Vaughn Murphy has a physical impairment, severe hypertension. (Murphy Depo., p. 159, ln. 12 and 13; Doubek

Defendant's Memorandum

Depo., p. 13, ln. 3-17; Couch Depo., p. 11, ln. 9-p. 12, ln. 14; Brown Depo., p. 28, ln. 23-p. 29, ln. 4).

Vaughn Murphy should be restricted from activities like running or anything that would cause significant cardiac workload. (Couch Depo., p. 38, ln. 22-24; Couch Depo., p. 42, ln. 2-6)

The nature and severity of Vaughn Murphy's high blood pressure is moderately severe medicated and severe or requiring possible hospitalization unmedicated. (Couch Depo., p. 44, ln. 25-p. 45, ln. 2; Doubek Depo., p. 9, ln. 1-3)

The duration or expected duration of Vaughn Murphy's impairment is chronic and permanent. (Couch Depo., p. 45, ln. 5-8; Doubek Depo., p. 15, ln. 4 and 5)

The permanent or long-term impact of Vaughn Murphy's high blood pressure is death, organ damage to the heart, heart attack, heart failure, kidney failure, visual disturbances and stroke. (Couch Depo., p. 45, ln. 5-16; Doubek Depo., p. 9, ln. 4 and 8)

Vaughn Murphy should be restricted out of the broad classes of work that include all jobs that are designated as very heavy and heavy. (Couch Depo., p. 39 and 40; Doubek Depo., p. 13, ln. 18-p. 14, ln. 1)

*Defendant's Memorandum***B. There are Genuine Issues of Material Fact Showing that Vaughn Murphy is a Qualified Individual With a Disability.**

Paragraphs 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 42, 43, 44, 46, are all uncontroverted.

Paragraphs 17, 28, 29, 30 and 45 are controverted to the extent at they do not state a genuine issue of material fact. They are not statements of fact at all, but statements of law. They are objected to as not proper statements of fact and should be stricken. Paragraph No. 45 is a clear statement of law and not a statement of fact. It is a legal issue that has no place in a statement of uncontroverted facts in a summary judgment motion.

Paragraph 14: When Plaintiff filled out his application for employment at UPS, in addition to knowing that driving would be a required part of his job, he also knew that a condition of his employment would be taking and a passing a DOT physical and obtaining a DOT health card. This is controverted to the extent that a conditional offer of employment was made. It's clearly controverted that a conditional offer of employment was made. Vaughn Murphy has testified that at no time was he ever offered a job or offered a conditional term of employment until after he filled out the application that asked illegal health questions about whether he had a condition that required accommodation, had a condition that might put others at risk, ever received work comp or disability compensation or ever had an occupational injury. He was also asked numerous other questions about disability on August 16, 1994. (Couch Exh. No. 4, medical history form) (Murphy Depo., p. 82, ln. 24-p-83, ln. 5)

Defendant's Memorandum

Paragraph No. 20: Plaintiff and other UPS mechanics were expected and required to drive tractor/trailers and package cars. A tractor/trailer has a gross weight rating of 55,000 pounds. A package car has a gross weight rating of 12,000 to 20,000 pounds. This statement is uncontroverted. It is controverted that driving is an essential job function for Vaughn Murphy. (See job description which is Exh. 21 to Rudy Arzola Depo. and Vaughn Murphy Depo., p. 163, ln. 16-p. 164, ln. 3)

Paragraph No. 33: Plaintiff is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep, irritability, rage, and contempt for people. Clearly controverted. Vaughn Murphy has testified that 160/100 has been the best compromise between getting his blood pressure way down to 140/80 and the side effects. When he has gotten his blood pressure down to 140/80 he feels the side effects listed by the Defendant. He did not testify that he was unable to get his blood pressure own to 160/90. At this point he is very close to getting it to 160/90 but needs a minor regulation of his medication. (Murphy Depo., p. 134 and 135, 154 and 155)

Paragraph No. 34: Dr. Doubek testified that Plaintiff would "not be able to function" if he took medication to get his blood pressure below 60/90. Controverted. Again, the Defendant is making misleading statements. First of all the question is not in proper form and is objected to. How Dr. Doubek testified does not create an issue of uncontroverted fact. As stated above, Vaughn Murphy's blood pressure in the past has been down as low as 120/80 and he felt the side effects. He has not felt the side effects in the range of 160/100. Dr. Doubek clearly said that it's possible for Vaughn Murphy to get to the 160/90 range

Defendant's Memorandum

and to be able to function and not have side effects. (Doubek Depo., p. 22, ln. 8-25)

Paragraph No. 35: Vernon Winger, transportation manager for the Kansas Corporation Commission, who is responsible for regulation of motor common carriers, testified that a mechanic who has driving responsibilities is required to have a DOT health card. Controverted. Vernon Winger said, "I don't know." (Winger Depo., p. 14, ln. 2-4) It's also objected that this is not a statement of fact. It is an improper form.

Paragraph No. 40: Plaintiff should have been disqualified on his initial exam and not issued a DOT health card. Absolutely and clearly controverted. This is an issue of law and not one of fact. It is objected to and should not be considered. Vaughn Murphy followed all of the application and orientation procedure demanded by UPS for employment. He submitted to a physical, passed the physical, and obtained a DOT health card. There is no evidence that his blood pressure was consistently above 160/90. Both Dr. Doubek and David Couch have testified that it was safe for him to drive a commercial motor vehicle. (Doubek Depo., p. 17, ln. 9-13; Couch Depo., pp. 17 and 32, ln. 1-6)

Paragraph No. 41: On September 15, 1994 while reviewing medical records, Monica Sloan, UPS medical services supervisor, discovered that Plaintiff's blood pressure was above the DOT standards and that his DOT health card had been issued in error. Controverted. It's controverted that Plaintiff's blood pressure was above the DOT standard and that his health card had been issued in error. (See above statements of controverted fact)

*Defendant's Memorandum**Further Statements of Uncontroverted Fact by Vaughn Murphy.*

When Vaughn Murphy had his blood pressure checked on August 16, 1994 at Midwest Occupational Health Services, a large cuff was not used, measurements were not begun after five minutes of rest, and only one reading was taken. (Murphy Affidavit, Paragraph 3)

Driving is not an essential job function of a mechanic. (See job description marked as Exh. 21 to Arzola Depo. which does not list driving as essential job function; Vaughn Murphy Depo., pp. 163 and 164).

Vaughn Murphy was not required to take a driving test as required by drivers at UPS. (Murphy Affidavit, Paragraph 2)

* * *

(R. 309)

III. ARGUMENT

* * *

C. The Defendants Did Regard Vaughn Murphy as Disabled.

Vaughn Murphy claims that his hypertension does substantially limit his major life activities. His hypertension is severe, permanent and will ultimately result in major organ damage and death. Plaintiff also brings the alternative theory that the Defendant *regarded* him as disabled. The Defendant regarded him as disabled because he passed, all the requirements

Defendant's Memorandum

and submitted to all the tests that UPS required. He passed all the tests for mechanics and took and passed his physical. He had a DOT health card. If he was driving down the block from UPS doing a road test on a package car and was stopped by a police officer for the City of Topeka, Vaughn Murphy could have produced a commercial driver's license and a health card that allowed him to drive the vehicle. First of all, it's uncontroverted that Vaughn Murphy was fired because of his high blood pressure. Exh. 23 of Rudy Arzola's deposition states that he was fired because he "did not pass physical." But he did, in fact, pass his physical. Vaughn Murphy has testified that he was fired because of his hypertension. (Murphy Depo., p. 125, ln. 22) Vaughn Murphy has also testified that Rudy Arzola told him that he was fired because of his hypertension and said, "We can't be responsible. You might die. . . . Well, with that kind of blood pressure, you are going to die and we will be responsible." Dr. Brown, UPS's company doctor, also said, "I would say the risk is great enough I wouldn't want him to drive down the road in a very heavy vehicle." These are exactly the kind of discriminatory and stereo-typical statements, comments and points of view that the ADA is designed to stop. Just because someone has high blood pressure, doesn't mean that they are automatically going to have a stroke or a heart attack and die or that the risk is so great that that's likely to happen. That has to be evaluated on a case-by-case basis. The Defendant is not raising the defense of direct threat in this case. Vaughn Murphy was fired because of his high blood pressure. UPS thought that since he was overweight and had high blood pressure, he might kill someone if he drives. That's discriminatory, bigoted and prejudiced.

Since Vaughn Murphy had his CDL and his health card, he was perfectly able and legally entitled to drive any vehicle.

Defendant's Memorandum

The only thing that stopped him was UPS's personal determination and misinterpretation of DOT regulations. Even though he passed all their tests and had gotten a health card, they regarded him as disabled and fired him of their own accord.

* * *

(Record 291-310)

8

Supreme Court, U. S.
FILED
FEB 22 1999
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No. 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,
Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12102(2)(A), should the determination whether an individual's impairment "substantially limits" one or more major life activities be made without consideration of mitigating measures, as the ADA's structure and the federal agencies Congress charged with implementing the ADA uniformly require?

2. Whether UPS "regarded" Mr. Murphy as disabled within the meaning of the ADA, 42 U.S.C. § 12102(2)(C), when UPS fired Murphy because it believed his high blood pressure precluded him from obtaining a health card under Department of Transportation regulations?

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OPINIONS BELOW

The October 22, 1996, opinion of the United States District Court for the District of Kansas granting summary judgment to UPS is reported at 946 F. Supp. 872. *See* Appendix to Petition for a Writ of *Certiorari* 7a-37a. The March 11, 1998, decision of the United States Court of Appeals for the Tenth Circuit affirming the District Court is unreported. *See id.* at 1a-6a.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision on March 11, 1998. Petitioner filed a timely petition for a writ of *certiorari* on June 9, 1998, and this Court granted plenary review on January 8, 1999. 119 S. Ct. ____.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3 of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12102, defines "disability" as follows¹:

(2) Disability. The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

1. The Joint Appendix includes Title I of the ADA, the Equal Employment Opportunity Commission ("EEOC") regulations located at 29 C.F.R. Pt. 1630.2(g)-(j), (l)-(m), and the EEOC interpretive guidance to those regulations. Some of this material also is printed in Appendix C to the petition for a writ of *certiorari*.

Title I of the ADA, in 42 U.S.C. § 12112, prohibits discrimination in employment on the basis of disability:

(a) General Rule. No Covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The phrase "qualified individual with a disability" is defined in 42 U.S.C. § 12111(8):

The term "qualified individual with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Pursuant to a congressional directive, 42 U.S.C. § 12116, the Equal Employment Opportunity Commission ("EEOC") promulgated regulations defining important ADA terms and concepts for purposes of implementing and enforcing Title I. Relevant to this case are the following EEOC regulations:

29 C.F.R. § 1630.2

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. . . .

(i) Major life activities —

means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits —

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. * * *

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

At the same time the EEOC issued the preceding regulations, and pursuant to the same formal notice and comment procedures, it promulgated Interpretive Guidance as an appendix to the regulations. That Interpretive Guidance provides in pertinent part as follows²:

Section 1630.2(j) Substantially Limits

* * * *

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. * * * *

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

* * * *

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

2. The full text of these interpretive guidance provisions is included in the Joint Appendix, 35a-46a.

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the employee to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled. * * * *

Relevant to this particular case are Department of Transportation regulations that provide as follows:

49 C.F.R. § 391.41:

(a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so. . . .

(b) A person is physically qualified to drive a commercial motor vehicle if that person . . .

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.

49 C.F.R. § 391.43:

(f) If the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle.

STATEMENT OF THE CASE

Vaughn Murphy has had very severe high blood pressure since at least age 10. Appendix to Petition for a Writ of *Certiorari* (hereinafter "Pet. App.") 2a, 13a. Unmedicated, his blood pressure runs approximately 250/160. *Id.*³ Even with medication, if Murphy tries to reduce his blood pressure to normal levels, he will suffer "severe side effects such [as] stuttering, loss of memory, impotence, lack of sleep and irritability." *Id.* at 16a. According to his physician, Murphy is largely unable to function if he reduces his blood pressure to normal levels. *Id.*

Indeed, there is evidence that Murphy's major life activities of running, exercising, lifting, eating, hearing and seeing all are adversely affected, even when his hypertension is medicated. *Id.* at 13a. For example, Murphy himself testified that, even with his medication, he has limited stamina, must carefully restrict his diet, has ringing in his ears, and "runners or bubbles" that frequently flash across his vision. Joint Appendix ("J.A.") 56a-58a. Murphy further testified that his medication can give him gout that keeps him bedridden for days at a time. *Id.* at 51a. For 22 years as a mechanic prior to working for UPS, Murphy used levers or devices to lift heavy objects, avoided running, did not perform work above his head, and generally avoided heavy or very heavy work. Pet. App. 13a. Murphy also was under a doctor's orders not to hold a job involving repetitive lifting of 200 pounds or more. *Id.*

3. The Fifth Report of the Joint National Committee on Detection, Evaluation, and Treatment of High Blood Pressure, Vol. 153, Arch. Internal Med. 154, 161 (Jan. 25, 1993), classifies blood pressure in the following categories:

Category	Systolic	Diastolic
Normal	<130	<85
High Normal	130-139	85-89
Hypertension:		
Stage I (mild)	140-159	90-99
Stage II (moderate)	160-179	100-109
Stage III (severe)	180-209	110-119
Stage IV (very severe)	>210	>120

In early August, 1994, Murphy applied to UPS for a mechanic position. Pet. App. at 2a. UPS requires that its mechanics have: (1) a commercial drivers license (which Murphy had); and (2) a Department of Transportation ("DOT") health card, which Murphy obtained. *Id.* As part of his DOT health card application process, Murphy submitted to a physical performed by a DOT examiner, David Couch, a registered nurse. *Id.* Couch took Murphy's blood pressure, which was 186/124, and issued him a DOT health card pursuant to DOT regulations. *Id.* at 2a-3a. On August 18, 1994, UPS hired Murphy to work as a mechanic. *Id.* at 13a.

In mid-September, 1994, Monica Sloan — a UPS company nurse, was reviewing Murphy's file when she observed that Couch had taken Murphy's blood pressure as 186/124. Sloan concluded that Couch had improperly issued Murphy's DOT health card. Moreover, Sloan concluded that Murphy was not qualified to work for UPS because his blood pressure exceeded 140/90 or 140/80, which is what Sloan believed UPS's standard to be. J.A. 88a-89a, 93a-94a, 47a. After retaking Murphy's blood pressure, which was 160/102 and 164/104, on September 26, J.A. 47a-48a, UPS terminated Murphy's employment as a mechanic on October 5, 1994, ostensibly because his hypertension exceeded DOT requirements for obtaining a DOT health card. Pet. App. at 3a, 16a-17a. Murphy testified that a UPS supervisor told him (Murphy) that he was fired. J.A. 53a; *see id.* at 105a.

Murphy later filed this ADA suit against UPS. In order to state a claim under the ADA, Murphy has to satisfy three statutory requirements. First, he must prove that he has a "disability" within the meaning of the statute. In this case, that means that he must prove either that he has a physical impairment that substantially limits one or more of his major life activities, or that UPS regarded him as an individual having such an impairment. *See* 42 U.S.C. §§ 12102(2)(A), (C). Second, Murphy must prove that he is a "qualified individual with a disability," which is defined to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Finally, Murphy must prove that UPS discriminated against him

because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Even if Murphy satisfies all three statutory requirements, UPS may raise statutorily-recognized defenses. These include: (1) that the necessary accommodations for Murphy would impose an undue hardship on UPS, 42 U.S.C. § 12112(b)(5)(A); (2) that Murphy failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. § 12113(a); or (3) that Murphy would pose a direct threat to other individuals in the workplace. 42 U.S.C. § 12113(b).

Following discovery, the District Court granted summary judgment to UPS on all aspects of Murphy's ADA cause of action. Pet. App. 7a-37a. Relying on Tenth Circuit cases addressing the ADA, the District Court first decided that Murphy's severe hypertension should be evaluated in its medicated state in determining whether his hypertension "substantially limits" his major life activities. Pet. App. 23a-29a. Applying that standard, the court next opined that no rational factfinder could conclude that Murphy was substantially limited in any major life activities because, when Murphy is medicated, the only limitation his physician specifically imposed was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 29a-32a. The District Court also rejected Murphy's "regarded as" claim, stating that UPS "did not regard Murphy as disabled, but only that he was not certifiable under DOT regulations." *Id.* at 32a.⁴

The Tenth Circuit affirmed, also finding not a single genuine issue of disputed, material fact. First, relying on its decision in *Sutton*

4. Although recognizing that these two rulings disposed of the case, the District Court went on to determine, as a matter of law, that Murphy could not perform the essential functions of the job of UPS mechanic, that UPS's "compliance" with DOT regulations was a complete defense, and that there were no reasonable accommodations UPS could have provided to Murphy to permit him to do the job. Pet. App. 33a-37a.

v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), the Tenth Circuit held that the "substantially limits" inquiry of the first prong of the "disability" definition requires consideration of mitigating measures. Pet. App. 4a. The Tenth Circuit ruled that, as a matter of law, Murphy's severe hypertension does not substantially limit any major life activities when medication is considered. *Id.* The Tenth Circuit then concluded that Murphy also failed to state a claim under the "regarded as" prong of the definition. The court stated that UPS "did not base its termination of Murphy on an unsubstantiated fear that he would suffer a heart attack or stroke," but instead fired him "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." *Id.* at 5a. In the Tenth Circuit's view, it followed as a matter of law that UPS, "in its termination decision, did not regard Murphy as having an impairment that substantially limits a major life activity." *Id.*⁵

SUMMARY OF THE ARGUMENT

Vaughn Murphy necessarily established that he has a "disability" in at least one of three ways the ADA defines that term. First, he has an impairment that substantially limits one or more of his major life activities. 42 U.S.C. § 12102(2)(A). In the alternative, UPS fired Murphy because it "regarded" him as having such an impairment. *Id.* § 12102(2)(C). In order for Murphy to establish a *prima facie* claim under Title I of the ADA, he must prove that: (1) he has a "disability"; (2) he is a "qualified individual"; and (3) UPS fired him because of his "disability. The issues before this Court involve only the first requirement. The Tenth Circuit's fundamental error in this case was to merge all three requirements, effectively holding that Murphy has no "disability" because he is not a "qualified individual" and UPS acted in reliance upon DOT regulations rather than with a discriminatory motive.

This Court recently made clear that three requirements must be satisfied in order to establish a "disability" under the first prong of

5. The Tenth Circuit also declared that, "because we have concluded that Mr. Murphy is not an individual with a disability, we need not reach the question of whether he is a qualified individual with a disability. . . ." Pet. App. 5a. "Likewise, we need not address his remaining contention, namely, that DOT regulations do not provide a defense to his ADA claim." *Id.* at 6a.

the ADA definition: the individual must suffer from (1) an impairment (2) that substantially limits (3) one or more of his major life activities. *See Bragdon v. Abbott*, 118 S. Ct. 2196 (1998). Because it is undisputed that Murphy's severe hypertension is an "impairment", the first issue in this case is whether his impairment "substantially limits" him. The Tenth Circuit erred by requiring that the "substantially limits" inquiry be made by assessing Murphy's hypertension in its medicated state.

The ADA's language and structure demonstrate that mitigating measures should not be considered in making the threshold "disability" determination. Rather, the effects of mitigating measures become relevant when making the second determination under the ADA — whether the individual is qualified for the job or program at issue. The ADA defines the term "disability" inclusively for purposes of the entire statute. 42 U.S.C. § 12102(2). Subsequently, the ADA addresses disability discrimination in different contexts — such as employment and public accommodations — in separate titles, with provisions specifically tailored to the concerns and considerations unique to those contexts. In the employment context, for example, Congress specifically provided for an additional inquiry into whether a particular disabled individual is "qualified," *i.e.*, can perform the essential functions of the job at issue, with or without reasonable accommodations. 42 U.S.C. § 12111(8). The individual also must prove that the employer discriminated on the basis of the individual's disability. 42 U.S.C. § 12112(a). In addition, Congress created at least three statutory defenses for employers.

Thus, Congress defined "disability" inclusively but provided that, in appropriate cases, the ADA's coverage may be narrowed at later stages of the inquiry. Congress did not enact a statute that makes the threshold "disability" inquiry the eye of a needle and Vaughn Murphy the camel. Rather, it is in making the "qualified individual" and statutory defense assessments, not when making the threshold determination whether Murphy has a disability, that questions regarding Murphy's medication and other ameliorative measures should be raised and addressed. *Cf. School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987) (under the Rehabilitation Act, the model for the ADA, "the definition of handicapped individual is

broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief"). Otherwise, the "qualified individual" requirement and statutory defenses become largely irrelevant, as the Tenth Circuit's decision demonstrates.

The result compelled by the ADA's language and structure is further confirmed by the ADA's legislative history. Congress expressly recognized that the determination whether an individual has a "disability" under the ADA is the beginning, not the ending, of the statutory inquiry. The reports of the three congressional committees that had responsibility for the ADA uniformly and clearly indicate that Congress intended the "substantially limits" determination to be made without consideration of mitigating measures. No committee members issued any dissenting or opposing views on this point.

Importantly, the federal agencies charged with implementing the ADA uniformly require that mitigating measures not be considered in making the "substantially limits" determination. Pursuant to formal notice and comment procedures, both the EEOC — the agency Congress charged with implementing Title I — and the Department of Justice, which is responsible for Titles II and III, have formally promulgated regulations and interpretive guidance requiring that the "substantially limits" determination be made without regard to mitigating measures. Because the EEOC's regulations and interpretive guidance are consistent with the ADA's language, structure and clear congressional intent, and because the EEOC promulgated the regulations and guidance pursuant to formal notice and comment procedures, the EEOC's interpretation of the ADA must be given *Chevron* deference. As it did recently in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court should defer to the implementing agency's permissible construction of the ADA. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. ___, 67 U.S.L.W. 4104, 4112 (Jan. 25, 1999).

Even if this Court were to require consideration of mitigating measures in determining whether Murphy has a "disability," the Tenth Circuit improperly affirmed the grant of summary judgment to UPS.

Murphy produced evidence that he suffers from an impairment that substantially limits one or more of his major life activities even when he is medicated, as well as when he is not. This evidence, which the lower courts essentially ignored, precludes a grant of summary judgment in UPS's favor.

The ADA's "disability" definition also includes people who are "regarded" as disabled, even if they are not actually disabled. In the alternative, Murphy states a valid claim under this definition. UPS's only asserted reason for firing Murphy, which the Tenth Circuit relied upon exclusively in ruling in UPS's favor, was that Murphy's blood pressure is too high for him to obtain a DOT health card. That assertion supports rather than defeats Murphy's "regarded as" claim. UPS believed Murphy could not do the job, and fired him because of that belief. Whether or not DOT regulations compelled that action may be relevant to whether Murphy was a "qualified individual" under the ADA, or perhaps to certain statutory defenses that may or may not be available to UPS. But, in making the threshold "disability" determination, the DOT regulations establish rather than negate the fact that UPS "regarded" Murphy as disabled.

Murphy has established that he has a "disability" under the ADA, either because he has an "impairment that substantially limits one or more major life activities" or because UPS "regarded" him as having such an impairment. The Tenth Circuit's judgment in favor of UPS must be reversed.

ARGUMENT

This case presents a striking example of the "catch-22" situation that the Tenth Circuit's decision creates for employees with physical or mental impairments. UPS successfully argued that Vaughn Murphy, who indisputably suffers from severe hypertension that will eventually kill him, is not disabled because he can take medication to ameliorate some of the effects of his hypertension. At the same time, UPS admits that it fired Murphy precisely because UPS believed that Murphy's high blood pressure made him unfit to work in any job requiring a DOT health card. The ADA does not permit UPS to have it both ways.

Under the Tenth Circuit's interpretation of the statute, many Americans with impairments will never be given the opportunity to

demonstrate that they are qualified to work. If the effects of an impairment can be limited by mitigating measures, the Tenth Circuit's interpretation means that the ADA will not protect the individual at all, even if that individual is qualified for the job, even if reasonable accommodations are available (or even unnecessary) and will impose no undue hardship on the employer, even if the individual poses no threat to the health or safety of anyone, and even if the employer acknowledges that it fired or refused to hire the individual precisely because of the impairment.

Arguing that Murphy is not disabled because he can take medication to ameliorate some of the effects of his severe hypertension but, at the same time, arguing that he is not qualified for the job precisely because he has hypertension, makes a mockery of the ADA. Congress declared that a primary purpose of the ADA was to level the playing field for "some 43,000,000 Americans [with] one or more physical or mental disabilities. . . ." 42 U.S.C. § 12101(a)(1). In a recent decision, this Court did not hesitate to give the ADA's language its full reach. See *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998) (unanimously concluding, in a case involving an inmate whose impairment was *hypertension*, that Title II of the ADA applies to state prison inmates because "[s]tate prisons fall squarely within the statutory definition of 'public entity' ", *id.* at 1954, and the statutory definition of the term "qualified individual with a disability" on its face applies to state prisoners. *Id.* at 1955)).

Under the ADA, the threshold "disability" requirement is not, and rightfully so, an obstacle that forecloses any possible relief against an employer that discriminates on the basis of physical and mental impairments whose effects can be ameliorated by mitigating measures. Indeed, every tool of statutory construction points to just the opposite conclusion, *i.e.*, that the ADA's "disability" definition is inclusive.

I.

**THE ADA'S "DISABILITY" DETERMINATION SHOULD
BE MADE WITHOUT CONSIDERATION OF
MITIGATING MEASURES.**

A. The Mitigating Measures Question

Unquestionably, the "starting point for interpretation of a statute is 'the language of the statute itself.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This Court has emphasized that statutory interpretation is not typically an exercise in construing single words or phrases but, instead, the Court focuses on "the plain meaning of the whole statute, not of isolated sentences." *Beecham v. United States*, 511 U.S. 368, 372 (1994). Thus, "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 131 (1993).

The first definition of "disability" in the ADA is "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(2)(A). This Court recently recognized that, in order to satisfy this statutory definition, an ADA plaintiff such as Murphy must demonstrate that he (1) has an "impairment" and that his impairment (2) "substantially limits" (3) one or more of his major life activities. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-07; *id.* at 2214 (Rehnquist, C.J., concurring in part, dissenting in part). The statutory definition does not expressly indicate whether mitigating measures should be considered or should not be considered in making the "substantially limits" inquiry. The ADA's structure, however, permits but one answer to the question, and requires rejection of the Tenth Circuit's interpretation.

Murphy's severe hypertension is a constant condition. It can be treated with medication and some of its effects limited or controlled. But Murphy's hypertension is never "cured" and it never goes away. Nor is Murphy ever completely relieved of the debilitating effects of his hypertension, medicated or not. That Murphy may be able to take advantage of medication to limit the debilitating effects of his

condition often may mean, in practice, that he will not require any sort of accommodation from an employer, reasonable or otherwise. But Murphy's accomplishment should not leave him subject to discrimination based on his underlying medical condition.

Murphy should not be denied the protection of the ADA simply because he has taken the initiative or has the financial resources to limit the effects of his hypertension. Nothing in the ADA suggests that Congress's purposes included penalizing self-help. To the contrary, the ADA's inclusive "disability" definition does not, and rightfully so, exclude all those who may be able to overcome or manage their disabilities with ameliorative measures. The protections of Title I are not limited to Americans who use wheelchairs.

The ADA does not define the important terms "impairment," "substantially limits," or "major life activity," but instead expressly delegates the task of defining those terms to the EEOC. *See* 42 U.S.C. § 12116. The phrase "substantially limits" certainly refers to the effects of the "impairment," but whether the "substantially limits" requirement should be evaluated with consideration of mitigating measures or without is not stated. Indeed, the Court recently acknowledged this issue in *Bragdon*, but expressly declined to resolve it. 118 S. Ct. at 2206 (noting that the Solicitor General directed the Court "to regulatory language requiring the substantiality of a limitation to be assessed without regard to available mitigating measures," but concluding that "[w]e need not resolve this dispute in order to decide this case").

This Court has addressed the ADA directly in two recent decisions. *See Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998); *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998). In neither case was the Court required to decide the issue this case presents. Indeed, as noted above, in *Bragdon* the Court expressly reserved decision on the mitigating measures question. *See* 118 S. Ct. at 2206. At the same time, both decisions are consistent with an interpretation of the statute that excludes consideration of mitigating measures in making the "substantially limits" determination.

In the first of these two cases, *Yeskey*, the plaintiff, was a prison inmate whose *hypertension* precluded him from participating in a "boot camp" program. 118 S. Ct. at 1953. This Court rejected the prison's argument that prisons are not "covered entities" and that inmates are not "qualified individuals" under Title II of the ADA. Under the ADA, however, it is unnecessary to reach the "qualified individual" determination unless the plaintiff first is determined to have a "disability," which is always a threshold inquiry. The Court's opinion in *Yeskey* appears to assume that the plaintiff's hypertension was a "disability," *see* 118 S. Ct. at 1955, a position fully consistent with interpreting the ADA to require that the "substantially limits" determination be made without consideration of mitigating measures.

The second case, *Bragdon v. Abbott*, involved the question whether an asymptomatic HIV-infected woman suffered from an impairment that substantially limited a major life activity.⁶ With respect to the "substantially limits" requirement, the Court first discussed the woman's risk of transmitting HIV to male sexual partners when attempting to conceive a child. Finding the risk significant, and ignoring possible mitigating measures such as artificial insemination or in vitro procedures, the Court concluded that the plaintiff's reproductive activities were substantially limited. *Id.* at 2206. Second, the Court considered the risk that the woman could transmit HIV to her child if she became pregnant. The Court acknowledged evidence suggesting that such risks could be reduced with mitigating measures, but also noted that the Solicitor General pointed out that the relevant Department of Justice regulations, like the EEOC regulations at issue in this Title I case, require "the substantiality of a limitation to be assessed without regard to available mitigating measures." *Id.* Ultimately, the Court declared that it need not decide the mitigating measures question in *Bragdon* because, even

6. The Court in *Bragdon* had little difficulty in concluding that HIV infection is an "impairment," declaring that HIV infection "is an impairment from the moment of infection." 118 S. Ct. 2196, 2204. In language that aptly describes Mr. Murphy's severe hypertension, the Court observed that the plaintiff's HIV infection in *Bragdon* was "a physiological disorder with a constant and detrimental effect on" the plaintiff's bodily systems "from the moment" the condition arose. *Id.* at 2204 (emphasis added). The Court also concluded that "reproduction is a 'major life activity' under the ADA. *Id.* at 2204-05.

with such measures, the chance of infecting a child during childbirth could not be said as a matter of law not to constitute a substantial limitation. *Id.*

Although this Court in *Bragdon* reserved judgment on the mitigating measures issue, the Court's opinion is fully consistent with an interpretation of the statute that requires the "substantially limits" determination to be made without consideration of mitigating measures. For example, the Court evaluated at least one of the claimed substantial limitations — the plaintiff's inability to conceive a child because of the risk of transmission of the disease to her male partner — without regard to any possible mitigating measures.⁷ Certainly, nothing in the Court's opinion is inconsistent with reading the ADA to require that mitigating measures not be considered.

UPS has argued in this and other cases that the statutory language requires consideration of mitigating measures because the statute refers to an impairment that "substantially limits" major life activities "of such individual." UPS's argument apparently is that "substantially limits" means "*currently or actually* substantially limits" which, of course, the statute does not say. In UPS's view, if the effects of a particular plaintiff's medical condition can be limited by medication or other measures, the impairment does not currently nor actually "substantially limit" the plaintiff. Contrary to UPS's assertion, the mere present tense usage of the term "substantially limits" in the statutory definition does not answer the question whether the "substantially limits" determination is to be made by considering mitigating measures or without considering such measures. Rather, as the First Circuit concluded, UPS's interpretation "begs the question." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859 (1998).

Interpreting the ADA so that the "disability" determination requires the consideration of mitigating measures will mean that, in many instances, employers can reject or fire employees with a wide

7. At the conclusion of its "substantially limits" analysis, the Court also observed that "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." 118 S. Ct. 2196, 2206.

array of medical conditions but avoid any ADA liability. And they can do so without ever permitting such persons an opportunity to demonstrate that they are qualified for the job. See Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 448 (1991) (describing this "Catch-22 situation").

Ultimately, the critical question is whether the first statutory "disability" definition, read in context and in light of the entire statutory scheme, means "substantially limits without mitigation" or "substantially limits with mitigation." The latter interpretation, which the Tenth Circuit adopted, is not compelled by the statutory language, nor supported by this Court's prior ADA decisions. More importantly, the Tenth Circuit's interpretation is contrary to the ADA's overall structure and operation, Congress's stated findings and purposes, the ADA's legislative history, and the uniform interpretation of the agencies Congress charged with implementing the ADA.

B. The ADA's Structure Demonstrates That The "Disability" Definition Is Inclusive

In words particularly apt to this case, the Court has observed that

Just as a single word cannot be read in isolation, nor can a single provision of a statute. As we have recognized: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Smith v. United States, 508 U.S. 223, 233 (1993) (quoting *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)) (emphasis added); see also *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (a statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context").

Reading the statutory "substantially limits" requirement to exclude consideration of mitigating measures is the only interpretation that is consistent with and faithful to the overall structure of the ADA. The "disability" inquiry is a threshold requirement. There are many indications in the ADA, and none to the contrary, that this threshold requirement does not operate as the eye of the needle for ADA plaintiffs. Rather, the threshold "disability" requirement simply confirms that plaintiffs are within the large class of Americans that Congress designed the ADA to protect.

Moreover, the threshold "disability" determination permits even plaintiffs who have either no actual impairment nor one that substantially limits a major life activity (even assuming mitigating measures are not considered), to pass through this gateway if they are discriminated against because of a "record" of an impairment or because the employer "regarded" the person as having such an impairment. 42 U.S.C. §§ 12102(2)(B), (C). When not compelled by statutory language and traditional rules of statutory interpretation, the ADA should not be read to offer no protection to Murphy simply because some of the effects of his severe hypertension can be ameliorated by medication while clearly protecting a plaintiff who does not even have an actual *impairment*, much less a *substantially limiting* one, because that person is "regarded" as disabled. Rather, Congress's use of the "record of" and "regarded as" alternatives in the statute are confirmation of the inclusiveness of the threshold "disability" definition.

Once ADA plaintiffs satisfy the threshold "disability" requirement, they still must prove that they are qualified for the job, including both that they can perform the essential functions of the job, and that any accommodations required are reasonable. 42 U.S.C. §§ 12111(8), 12112(a). At that point, the ADA plainly contemplates that assistive measures or actions be considered, by virtue of the use of the concepts of "qualified individual" and "reasonable accommodation." Indeed, it only makes sense that assistance and accommodation be considered when the question is whether the plaintiff can perform the essential functions of the job. But mitigating measures the individual alone can take, such as medication for high blood pressure, are not relevant to the threshold "disability" inquiry, nor are they the same thing as "reasonable accommodations" the employer must provide, such as

flexibility in a work schedule or permitting the individual the opportunity to actually take the medication while at work. *See* 42 U.S.C. § 12111(9) (defining "reasonable accommodation" solely in terms of employer actions).

In addition to satisfying the "qualified individual" requirement, an ADA plaintiff must prove that the employer discriminated in the terms, conditions or privileges of employment *because of* the plaintiff's *disability*, and not for some other reason. 42 U.S.C. § 12112(a). Lower federal courts generally have handled this requirement in the same fashion as under Title VII, using the burden-shifting procedures of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Even if an individual satisfies all three statutory requirements ((1) disability, (2) qualified individual, and (3) discrimination) and therefore states an ADA claim, employers have several statutorily-recognized defenses. These include at least the following: (1) that the necessary accommodations for the employee would impose an undue hardship on the employer, 42 U.S.C. § 12112(b)(5)(A); (2) that the employee failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. § 12113(a); *see also* 29 C.F.R. § 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by Federal law or regulations"); and (3) that the employee would pose a direct threat to others in the workplace. 42 U.S.C. § 12113(b).

Importantly from a structural perspective, the term "disability" is defined in Section 3 of the ADA, a preliminary definitional section that applies to the entire Act. The terms "qualified individual with a disability," "reasonable accommodation," "undue hardship," and "direct threat," however, are defined specifically for Title I, which deals solely with employment discrimination. Thus, the definition of the threshold "disability" requirement, a prerequisite to application of *any* of the Act's Titles, not surprisingly is inclusive. Specific Title I provisions then address particular policy concerns about the effect of the ADA on employers. These more specific provisions, not the "disability" definition may, in appropriate cases, limit the statute's scope in the employment context.

In this respect, the ADA operates precisely like the Rehabilitation Act, on which it is modeled. For instance, in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), this Court considered whether an individual with tuberculosis was a "handicapped" individual under the Rehabilitation Act. Importantly, the Court explained that

[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individual is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief.

Id. at 284-85. The Court warned against making individuals "vulnerable to discrimination on the basis of mythology — precisely the type of injury Congress sought to prevent." *Id.* at 285. Importantly, in the ADA itself, Congress expressly required deference to preexisting court decisions and agency interpretations of § 504 of the Rehabilitation Act, as this Court acknowledged and followed in *Bragdon v. Abbott*. *See* 118 S. Ct. at 2202 (quoting 42 U.S.C. § 12201(a) and concluding that "[t]he directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").⁸

Thus, the ADA's "substantially limits" requirement should be assessed without consideration of mitigating measures. Under this interpretation, each aspect of the statutory definition applies and has operative effect. *Cf. Walters v. Metropolitan Educational Enter's Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). Murphy is not arguing that high blood pressure, even of the severe type from which

8. To the best of petitioner's knowledge, agency regulations implementing and interpreting the Rehabilitation Act do not directly address the mitigating measures question. What little guidance exists actually appears to support evaluating "handicaps" *without* consideration of mitigating measures. *See, e.g.,* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 154 n. 295 (1999) (citing Rehabilitation Act cases). Certainly, nothing in the Rehabilitation Act regulations or cases precludes an interpretation that mitigating measures should not be considered, an interpretation that appears to have been assumed in many of those cases, but was not addressed.

he suffers, is a *per se* or inherent disability. Rather, as the ADA clearly contemplates, the "disability" determination is made in each case on an individualized basis, but without consideration of mitigating measures.⁹

C. The ADA's Formal Legislative History Confirms That The "Disability" Determination Should Be Made Without Consideration Of Mitigating Measures

Were this Court to find that, even after considering statutory language and structure, the ADA is unclear or silent with respect to the mitigating measures question, then the Court should consider legislative history as an aid to statutory interpretation, as it has traditionally done.¹⁰ In this case, the legislative history is clear. The three congressional committees that had primary responsibility for the ADA all came down strongly and clearly in favor of a rule that mitigation should not be considered in making the "substantially limits" determination.

For instance, the House Labor Committee Report declares that

Whether a person has a *disability* should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially

9. This Court has more than once stated that it is bound to interpret statutes in light of the purposes Congress identified. *See, e.g., Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983). Reading the statutory "substantially limits" requirement to exclude consideration of mitigating measures is fully congruent with Congress's detailed list of findings and purposes. *See* 42 U.S.C. § 12101.

10. Legislative history may be particularly "useful to conscientious and disinterested judges" when a statute has "bipartisan support and has been carefully considered by committees familiar with the subject matter." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276 (1996) (Stevens, J., concurring). The House and Senate both approved the ADA by overwhelming votes, 377-28 in the House, and 91-6 in the Senate. *See Congress Clears Sweeping Bill to Guard Rights of Disabled*, Cong. Q. 2227 (July 14, 1990).

limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), at 52 (1990) (emphasis added).

Likewise, the House Judiciary Committee Report states that "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a *less-than-substantial limitation*." H.R. Rep. No. 101-485(III), at 28 (1990) (emphasis added). To the same effect, the Senate Labor Committee Report says that "whether a person has a *disability* should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116, at 23 (1989) (emphasis added). Clearer and more uniform statements of legislative intent are hard to imagine.

The only potentially countervailing legislative history is a statement in the Senate Labor Committee Report, not contained in either House Report, that provides as follows with respect to applying the third prong of the "disability" definition (the "regarded as having such an impairment" provision):

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

S. Rep. No. 101-116, at 24 (1989).

Employers such as UPS have seized upon this statement in seeking to require consideration of mitigating measures in applying the first prong of the disability definition. But it is thin justification for their argument. First, this comment appears only in the Senate report, and it is clearly made only in discussing the "regarded as" prong of the definition.

Second, and most significantly, this single paragraph in the legislative history is not actually inconsistent with the House and Senate Reports' uniform declaration that the "substantially limits" requirement is to be evaluated without consideration of mitigating measures. It is critically important to remember that there are widely varying degrees of many medical conditions. For example, blood pressure of 140/90 and above is considered "hypertension", but there are dramatic differences between a blood pressure of 140/90 and Murphy's unmedicated blood pressure of 250/160. Moreover, at least in certain age groups, such as older Americans, a blood pressure of 140/90 may be within the "normal" range, and therefore might not be considered substantially limiting at all.¹¹ But the ADA still protects such an individual from discrimination by an employer that wrongly "regards" blood pressure of 140/90 as a "disability."

The Senate Report does not specify the degree of impairment experienced in the example. Individuals with mild cases of diabetes or epilepsy that can be ameliorated without medication or with relative ease may in some cases not be substantially limited even if the evaluation is made without considering mitigating measures. But when an employer acts adversely to such an individual due to an exaggerated fear of or misunderstanding about that individual's condition, then the "regarded as" prong applies. Thus, at a minimum, the legislative history demonstrates that the Tenth Circuit erred. Murphy has a "disability", either because his hypertension substantially limits major life activities or because UPS "regarded" him as so limited.

11. The EEOC has defined "substantially limits" in part by requiring a comparison of the ADA plaintiff to "the average person in the general population." See 29 C.F.R. Pt. 1630.2(j)(i), (ii). The interpretive guidance also makes clear that this determination is relative to an *average* person. See 29 C.F.R. Pt. 1630.2(j), App. (individual is not substantially limited if the limitation "does not amount to a significant restriction when compared with the abilities of the average person.").

D. The EEOC's Formal Interpretation That Mitigating Measures Should Not Be Considered Is Entitled To *Chevron* Deference

1. *The EEOC, The Agency Congress Expressly Charged With Implementing Title I, Requires That The "Substantially Limits" Assessment Be Made Without Consideration Of Mitigating Measures*

Even were there any doubt, after applying this Court's usual rules of statutory construction, that the Tenth Circuit's reading of the ADA "disability" definition is wrong, this case should be resolved in Murphy's favor. In the ADA itself, Congress expressly granted the EEOC the authority — and charged it with the obligation — to "issue regulations in an accessible format to carry out this subchapter [Title I — Employment]."¹² 42 U.S.C. § 12116. The EEOC did so,

12. Congress provided the EEOC one year to propose, receive comments and finalize regulations to implement the ADA's employment provisions. Pursuant to this statutory grant of authority, the EEOC published an "Advance notice of proposed rulemaking" soliciting initial public comment on August 1, 1990. 55 Fed. Reg. 31192 (1990). On February 28, 1991, the EEOC published its proposed regulations and interpretive guidance. 56 Fed. Reg. 8578 (1991). Importantly, the proposed regulations also contained the full text of the interpretive guidance appendix, including the assertion that "disability" must be assessed without regard to mitigating measures and using the example of an insulin-dependent diabetic. See 56 Fed. Reg. at 8592-93. The EEOC pointed out that "[t]his proposed appendix represents the Commission's interpretation of the issues discussed and the Commission will be guided by it when resolving charges of employment discrimination." *Id.* at 8578.

When the EEOC published its final rules and interpretive guidance on July 26, 1991, the interpretive guidance requiring assessment without mitigating measures was essentially unchanged. See 56 Fed. Reg. 35726 (1991). The sole revision was to

the interpretive guidance accompanying § 1630.2(j) to make it clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. . . .

56 Fed. Reg. at 35727-28.

simultaneously issuing *both* regulations *and* interpretive guidance pursuant to formal rulemaking procedures. Critically, the EEOC's interpretive guidance (an appendix to the formal regulations) includes the following provision, which expressly addresses the question before this Court:

Section 1630.2(j) Substantially Limits

* * * *

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

Thus, with respect to the question whether the "substantially limits" assessment should include or exclude consideration of mitigating measures, the EEOC, after following formal notice and comment rulemaking procedures, expressly rejected the interpretation that the Tenth Circuit endorsed in this case.

2. *As In Bragdon v. Abbott, This Court Must Defer To The Implementing Agency's Permissible Construction Of The ADA*

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court resolved the question whether asymptomatic HIV infection constitutes a "disability" under the ADA. In concluding that such a condition is a "disability," the Court relied heavily on "administrative guidance issued by the Justice Department to implement the public accommodation provisions of Title III of the ADA." *Id.* at 2208-09. Specifically, the Court observed that

[a]s the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference.

118 S. Ct. at 2209 (internal statutory citations omitted; citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). Moreover, the Court in *Bragdon* also considered the views of other federal agencies charged by Congress with implementing other Titles of the ADA, including the EEOC's views with respect to Title I. 118 S. Ct. at 2209. Importantly, the Court in *Bragdon* relied upon DOJ and EEOC interpretive guidance, not just formal regulations. *Id.*

The familiar *Chevron* analysis in this situation is to first consider whether the language of the statute and congressional intent are clear and unambiguous with respect to the question raised. If so, then a court must give effect to that language and intent, rather than defer to an agency interpretation. *Chevron*, 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The "permissible construction" inquiry does not require the court to

conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Id. at 843 n. 11.¹³

13. The *Chevron* doctrine has been described as "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant." The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989). This presumption

operates principally as a background rule of law against which Congress can legislate. . . . Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.

Id. at 517.

(Cont'd)

Although it is unnecessary for the Court to reach the *Chevron* deference question at all, in light of the ADA's structure and clear congressional intent that mitigating measures should not be considered, *Chevron* deference is applicable in this case if the Court considers the EEOC's interpretation. First, the statutory "disability" definition itself does not expressly state a rule for mitigating measures, although the ADA's structure and congressional intent are clear that such measures should not be considered. Second, Congress expressly directed the EEOC to issue regulations implementing the provisions of Title I. Third, the EEOC adopted such regulations and interpretive guidance pursuant to formal notice and comment procedures. Thus, the EEOC's interpretation of the "substantially limits" requirement is entitled to *Chevron* deference. As this Court recently observed, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. ___, 67 U.S.L.W. 4104, 4112 (Jan. 25, 1999).

That the determinative EEOC interpretation is contained in an interpretive guidance appendix, rather than the regulations themselves, is of no significance. First, the EEOC promulgated the regulations *and* the interpretive guidance pursuant to formal notice and comment procedures. The EEOC received comments on the interpretive guidance at issue here, and revised the guidance as a result of the formal process.

Second, this Court has not drawn a distinction between formal regulations and formal agency interpretations of such regulations, either in general or specifically under the ADA. For example, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in deciding whether tuberculosis is a "disability" under the Rehabilitation Act,

(Cont'd)

If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.

Id. at 520.

this Court considered the appendix that the Department of Health and Human Services promulgated with its Rehabilitation Act regulations. 480 U.S. at 280 n.5. Similarly, in *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991), the Court declared that "we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Thus, whether the critical interpretation appears in the EEOC's regulations or the interpretive guidance appendix, this Court's "task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Third, in this case, the EEOC's interpretive guidance is not contrary to the language of the statute nor the clearly expressed intent of Congress. To the contrary, the EEOC's interpretation is the only one that is consistent with the ADA's structure and congressional intent. Moreover, the EEOC has adopted the same interpretation of the statute as the Department of Justice, which is statutorily charged with implementing Titles II and III of the ADA. *See* 28 C.F.R. Pt. 35, App. A § 35.104 ("The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services"); 28 C.F.R. Pt. 36, App. B § 36.104 (to same effect). As the agencies uniformly recognize, the statutory language, the structure and purposes of the ADA, and the legislative history all demonstrate that making the "substantially limits" determination without consideration of mitigating measures is the best reading of the statute, not just a "permissible" one.

At worst, the "disability" definition's "substantially limits" requirement is phrased in such a way that a "reasonable person could interpret the plain statutory language to require an evaluation either before or after ameliorative treatment," *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859 (1st Cir. 1998), as the Circuit split on this issue may demonstrate. Accordingly, the EEOC's view of the statute is entitled to *Chevron* deference. *See AT&T Corp. v. Iowa*

Util. Bd., 119 S. Ct. ___, 67 U.S.L.W. 4104, 4112 (Jan. 25, 1999) ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 126 (1985) (to same effect); cf. *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 470 (5th Cir. 1998) ("Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC").

E. In Any Event, There Are At A Minimum Genuine Issues Of Disputed, Material Fact Concerning Whether Murphy's Severe Hypertension Substantially Limits His Major Life Activities

The Tenth Circuit rejected Murphy's ADA claim as a matter of law at the summary judgment stage of this litigation. The Tenth Circuit held that the first prong of the "disability" definition requires consideration of mitigating measures and that, as a matter of law, Murphy's severe hypertension does not substantially limit any major life activities when medication is considered. Pet. App. 4a. The Tenth Circuit then concluded, again as a matter of law, that Murphy also failed to state a claim under the "regarded as" prong of the definition because UPS fired him because of DOT regulations, and not because of his hypertension. *Id.* at 5a.

With all due respect, the Tenth Circuit misapplied the summary judgment standard and ignored any facts that got in the way of the court's conclusions. Contrary to the Tenth Circuit's application of the summary judgment standard, this Court has consistently emphasized that, when ruling on a summary judgment motion, federal courts must view the evidence in the light most favorable to the non-moving party, with disputed facts and inferences drawn in favor of that party and against the moving party. *See Gen. Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997). The Tenth Circuit simply failed to do that in this case.

There is no factual dispute in this case that since at least age 10, Murphy has suffered from severe Stage IV hypertension, with his

unmedicated blood pressure running approximately 250/160. Pet. App. 2a, 9a. Nor is there any dispute that Murphy's condition is permanent, J.A. 67a, 71a, that the long term impact of such severe hypertension is major organ damage, for instance to his heart, kidneys and eyes, *id.* at 64a, 72a, and that Murphy's condition ultimately may kill him.¹⁴ *Id.* at 81.

There also is evidence and testimony in the record that Murphy's severe hypertension substantially limits numerous major life activities, such as running, lifting, eating, hearing, seeing, and working. J.A. 56a-58a, 51a-52a. Thus, if mitigating measures are ignored, the evidence precludes a grant of summary judgment to UPS on the "substantially limits" requirement of the statutory definition. Indeed, UPS disputes this evidence but, at a minimum, this evidence creates genuine issues of disputed, material fact.

Even if this Court interprets the "substantially limits" inquiry to require consideration of mitigating measures, summary judgment for UPS is improper. There is evidence in the record that Murphy is substantially limited in major life activities *even when medicated*. For example, Murphy testified that he has brought his blood pressure below 140/90 with medication, but that the side effects significantly limited his ability to function. J.A. 55a-56a. Those side effects included gout and lethargy that kept him bedridden for days at a time, making it difficult if not impossible for him to work. *Id.* at 51a. Even the District Court acknowledged that Murphy is unable to use medication to lower his blood pressure to normal levels "without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep and irritability." Pet. App. 16a.¹⁵

14. Thus, there is no question that Murphy suffers from an "impairment" within the meaning of the ADA. Cf. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998) (HIV infection is an "impairment" under the ADA from "the moment of infection" because it has "a constant and detrimental effect on" the individual's bodily systems).

15. Murphy suggested that he might be able to bring his blood pressure below 160/90, perhaps as low as 140/90, without suffering serious side effects from the medication. J.A. 55a-56a. His physician also testified that for Murphy to get his blood pressure down to approximately 150/100 with medication is "in the realm of possibility." *Id.* at 68a.

In any event, at this stage of the litigation, the question is not what evidence a District judge or Court of Appeals judges would find most credible or persuasive, but whether there are genuine issues of disputed, material fact with respect to the question whether Murphy's undisputed impairment "substantially limits" one or more of his major life activities. At a minimum, there are disputed material facts here, and that precludes summary judgment in UPS's favor.

II.

UPS FIRED MURPHY BECAUSE UPS "REGARDED" HIM AS DISABLED.

A. By Its Reliance Upon DOT Regulations, As A Matter Of Law UPS Fired Murphy Because It "Regarded" Him As Disabled

The ADA "disability" provision has three alternatives for defining the term "disability." An impairment that substantially limits major life activities is only the first one. Having a "record" of such an impairment or being "regarded" as having such an impairment also constitute a "disability" that qualifies an individual for ADA protection. 42 U.S.C. §§ 12102(2)(B), (C). In this case, UPS fired Murphy because it "regarded" him as having a disability. The Tenth Circuit erroneously endorsed UPS's action. The Tenth Circuit's rationale was that UPS fired Murphy "because his blood pressure exceeded the DOT's requirements." Pet. App. 5a. In the Tenth Circuit's view, UPS's reliance on the DOT regulations necessarily meant that UPS did not "regard" Murphy as disabled. *Id.* In fact, UPS's reliance compels the contrary conclusion.

The rationale for the "regarded as" definition is that, "although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling." H.R. Rep. No. 101-485(III), at 30. As this Court recognized when interpreting the Rehabilitation Act, the model for the ADA,

[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless

substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987). Thus, with respect to the Rehabilitation Act, but in language equally applicable to the ADA, this Court has emphasized that "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

The EEOC regulation implementing the "regarded as" provision, 29 C.F.R. § 1630.2(l), recognizes these principles and defines the concept as follows:

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

The EEOC interpretive guidance for this regulation further states that:

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the employee to less strenuous work because of

unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

29 C.F.R. § 1630.2(l) App.

The EEOC's position with respect to high blood pressure in this quotation superficially may appear at odds with its general position that mitigating measures should not be considered in making the "substantially limits" assessment. As explained above in Part I.C., of this brief, however, the positions can be reconciled. It is critically important to remember that there are widely varying degrees of high blood pressure, with blood pressure of 140/90 and above considered "hypertension." Thus, particularly depending upon a person's age group, blood pressure of 140/90 may not even be abnormal and, in comparison to an "average" person, might not be considered substantially limiting at all. But, in any event, the ADA still protects such an individual from discrimination by an employer that wrongly "regards" blood pressure of 140/90 as a "disability." Thus, at a minimum, the EEOC's interpretive guidance demonstrates that Murphy has a "disability", whether because he has an impairment that substantially limits major life activities or because UPS regarded him as having such an impairment.

The ADA's structure is such that the "disability" determination is only the threshold requirement for a plaintiff seeking to establish an ADA claim. This threshold inquiry is not the point at which the statute contemplates judgments being made about whether an individual is qualified for the job, whether any accommodations are feasible, or whether the employer has in fact discriminated against the individual. Those inquiries come later in the statutory scheme.

Thus, even were UPS and the Tenth Circuit correct in their understanding of the DOT regulations, it would make *no* difference with respect to the threshold "disability" inquiry. The DOT regulations, if they actually precluded Murphy from obtaining a DOT health card, might be relevant to the question whether Murphy is a "qualified individual with a disability," or they might be a *defense* to

Murphy's claim. But DOT regulations have nothing to do with the question whether UPS "regarded" Murphy as having a "disability," the threshold inquiry in any ADA case. It would make no sense to say that Murphy is not disabled if a job requires a DOT health card — because his blood pressure is too high to meet DOT regulations — and yet he might be considered to have a "disability" with respect to many other jobs that have no such requirement.

UPS indisputably "regarded" Murphy as having an impairment, severe hypertension, whether medicated or not — that substantially limits him in the major life activity of working.¹⁶ UPS "regarded" Murphy as unfit to work precisely because of his high blood pressure. Whether that view was based on misperceptions of the medical risks of Murphy's condition, stereotypes about people with high blood pressure, or even a good faith, legally justified belief that Murphy's blood pressure was too high for him to qualify for a DOT health card, does not matter in making the threshold "disability" determination. It is sufficient for purposes of that inquiry that UPS believed, for whatever reason, that Murphy's high blood pressure precluded him from performing a class of jobs.¹⁷ Employers need not act with sinister or evil motives in order to "regard" an employee as disabled. *See, e.g., Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3d Cir. 1997).

On this basis alone, the Tenth Circuit's judgment must be reversed. As a matter of law, UPS regarded Murphy as disabled. There

16. For example, Murphy offered evidence that he was fired precisely because of his high blood pressure. He testified that a UPS supervisor told him he (Murphy) was fired "because of my hypertension." J.A. 53a; *see also id.* at 105a. The supervisor who fired Murphy also admitted that he had received no training concerning the requirements of the ADA and that he was "not really" familiar with the law, declaring that he knew little more than that "they have to put up wheelchair signs." Record 380 (Rudy Arzola Deposition, p. 42).

17. DOT certification is required for "all employers, employees and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. § 390.3(a). Inability to obtain certification therefore implicates "a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i).

are no genuine issues of disputed, material fact concerning this question. By its admitted and exclusive reliance upon the DOT regulations, UPS has conceded this issue. Irrespective of what the DOT regulations actually require, the Tenth Circuit's legal error in endorsing UPS's conduct requires reversal.

B. UPS's Argument That Murphy's Hypertension Necessarily Disqualifies Him From Obtaining A DOT Health Card Is Incorrect As A Matter Of Law

UPS's justification for firing Murphy, which the Tenth Circuit endorsed, was that Murphy cannot qualify for a DOT health card. As the Solicitor General already has informed this Court, "the court of appeals' holding on this point was a clear legal error." Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae on Petition for a Writ of *Certiorari* 19.

UPS ostensibly fired Murphy because his blood pressure exceeded 160/90, the standard UPS now claims is an absolute limitation imposed by DOT regulations, although UPS's nurse initially claimed that 140/90 or 140/80 was UPS's standard. J.A. 47a, 88a-89a, 93a-94a. The relevant DOT regulations in fact provide as follows:

49 C.F.R. § 391.41

(a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so. . . .

(b) A person is physically qualified to drive a commercial motor vehicle if that person . . .

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.

49 C.F.R. § 391.43

(e) The medical examination shall be performed, and its results shall be recorded, substantially in accordance with the following instructions . . .

Blood pressure. Record with either spring or mercury column type of sphygmomanometer. If the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle.

Thus, on their face, the regulations do not impose an absolute limit of 160/90, nor do they automatically disqualify anyone and everyone who exceeds that blood pressure from obtaining a DOT health card.

The lower courts and UPS instead relied upon a 1988 Federal Highway Administration document entitled "Medical Advisory Criteria for Evaluation Under 49 C.F.R. Part 391.41." *See* Pet. App. 15a-16a.¹⁸ The document, which states in its first paragraph that "[m]ost commercial drivers with hypertension are not immediately unqualified to operate a commercial motor vehicle," J.A. 98a, declares that no driver with blood pressure higher than 181/105 may be qualified to operate a commercial motor vehicle. *Id.* at 99a. The document further directs, however, that drivers with blood pressure between 160/90 and 181/105 — which Murphy's blood pressure was when UPS retook it in late September following the nurse's review of his file, *see id.* at 47a-48a, may drive for three months and be retested to see whether their blood pressure has been reduced by measures such as medication. *Id.* at 98a.

The DOT regulation, in contrast, states only that a driver is required to have "no current clinical diagnosis of high blood pressure *likely to interfere with his/her ability to operate a commercial motor vehicle safely.*" 49 C.F.R. § 491.31(b)(6) (emphasis added). The regulation clearly contemplates that the ultimate decision regarding a driver's fitness rests in the discretion of the DOT examiner, at least within certain bounds that Murphy satisfied.

Thus, regardless of whether UPS fired Murphy because of unsubstantiated fears concerning his hypertension or the legally erroneous belief that Murphy could not possibly qualify for a DOT health card, UPS "regarded" Murphy as having an impairment that substantially limits his ability to work. In theory, UPS's erroneous claim that Murphy cannot

18. For the Court's convenience, this document is included in the Joint Appendix, 98a-101a.

satisfy DOT regulations, were it actually correct, perhaps might permit UPS to argue that Murphy is not a "qualified individual with a disability," 42 U.S.C. § 12111(8), or that he fails to satisfy a "qualification standard" that "has been shown to be job-related and consistent with business necessity." *Id.* § 12113(a). But UPS's purported reliance on DOT requirements supports rather than undermines the conclusion that UPS "regarded" Murphy as having an impairment that substantially limits his ability to work. Murphy's perceived limitations were the very basis UPS regarded Murphy as unfit to work and, therefore, fired him.

CONCLUSION

With all due respect, Vaughn Murphy's severe hypertension either substantially limits one or more of his major life activities, or UPS "regarded" him as disabled. For the foregoing reasons, Murphy respectfully requests that this Court reverse the judgment of the Tenth Circuit, and remand the case for further proceedings.

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Supreme Court, U.S.

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No. 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

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RULE 29.6 STATEMENT

Respondent's parent corporation is United Parcel Service of America, Inc. Respondent has no non-wholly owned subsidiaries.

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STATEMENT

Factual Background

Petitioner has hypertension that he controls with medication. Pet. App. 2a, 13a. His medical condition has no significant effect on his daily activities; he "functions normally doing everyday activity that an everyday person does." Pet. App. 4a; J.A. 63a, 108a. His only hypertension-related physical restriction is that he should not repetitively lift 200 pounds or more. J.A. 63a, 66a. Petitioner is able to work in a wide range of jobs, and his hypertension does not generally "limit his ability to work or obtain jobs in the open labor market." J.A. 112a, 114a. He has worked as a mechanic for 22 years without experiencing any limitations due to his hypertension, other than his self-imposed habits of using levers to lift heavy objects, not running to answer the telephone, and not working over his head. Pet. App. 13a; J.A. 52a.

In August 1994, petitioner applied to respondent United Parcel Service, Inc. ("UPS") for a position as a mechanic in UPS's Manhattan or Topeka, Kansas, facilities. UPS mechanics at those facilities must drive commercial vehicles on a regular basis in order to perform "road tests" (*i.e.*, driving tests of vehicles that have been or need to be repaired) and "road calls" (*i.e.*, driving a vehicle to the location of a broken-down vehicle, fixing the latter vehicle, and driving it back to the facility). Pet. App. 2a, 14a; J.A. 95a-96a. Because UPS tractor-trailer trucks and package "cars" weigh between 12,000 and 55,000 pounds, a valid Department of Transportation ("DOT") health card is required in order to perform road tests and road calls. *Id.*; 49 C.F.R. § 391.41(a). "Meeting DOT requirements is listed as [an] essential function of the job." J.A. 120a.

UPS conditionally hired petitioner as a mechanic, and required him to undergo a physical examination to determine whether he could obtain a valid DOT health card. Petitioner's blood pressure reading in this examination was 186/124, well in excess of the upper limit established by the applicable DOT criteria, which provide that where an indi-

vidual's "[i]nitial blood pressure [is] greater than 180 systolic and/or greater than 104 diastolic," "[t]he driver may not be qualified, even temporarily, until his or her blood pressure has been reduced to less than 181/105." J.A. 99a (emphasis in original); see C.A. App. 85 (same). The nurse who examined petitioner had never previously examined a UPS mechanic, however, and was unaware that UPS requires its mechanics to drive commercial vehicles. J.A. 74a, 84a, 93a. As a result, the nurse erroneously issued petitioner a DOT health card. *Id.*; J.A. 106a-107a; Pet. App. 16a.

Petitioner worked for UPS on the night shift in its Topeka facility, where his work included performing road calls on tractor-trailer trucks and road tests on package cars. At times during his shift, petitioner was the only mechanic on duty, and was therefore the only mechanic available to perform road tests and road calls. Pet. App. 14a-15a; J.A. 47a.

Shortly after petitioner commenced work, a UPS nurse discovered that petitioner's blood pressure reading exceeded the DOT standard and that his DOT health card had been issued in error. J.A. 84a, 93a; Pet. App. 16a. Petitioner was retested by another medical examiner, but his blood pressure was still in excess of 160/90. *Id.* at 16a-17a. DOT guidelines provide that a driver whose blood pressure is less than 181/105 but greater than 160/90 may, in the discretion of the certifying physician, be given a temporary 3-month DOT certificate to allow time for the driver to reduce his or her blood pressure below 160/90. J.A. 98a-99a. There is no evidence that the examiner who performed petitioner's second examination issued such a temporary certificate.

After learning the results of petitioner's second examination, UPS discharged him because he "did not meet the requirements of the Department of Transportation." J.A. 103a; see Pet. App. 5a, 32a; J.A. 85a-88a, 103a-105a.¹ Petitioner

¹ Petitioner errs in contending (Pet. Br. 7) that Monica Sloan, a UPS nurse, "concluded that [petitioner] was not qualified to work

[Footnote continued on next page]

initially sought a waiver of the DOT requirements (J.A. 49a; C.A. App. 109), but ultimately abandoned that request. J.A. 54a. He obtained another job as a mechanic within two to three weeks. Pet. App. 17a.

Proceedings Below

Petitioner commenced this action against UPS in the United States District Court for the District of Kansas under the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, *codified at* 42 U.S.C. §§ 12101 *et seq.* After completion of discovery, the district court granted summary judgment for UPS. Pet. App. 9a-37a. The court held that the plain language of the ADA requires evaluation of the real-world impact of impairments, and that petitioner's medicated hypertension was not a "disability" under the ADA. *Id.* at 22a-32a. The court also concluded that petitioner was not "regarded as" disabled, that petitioner was not "qualified" for the job of UPS mechanic, and that UPS's compliance with DOT regulations provided a complete defense to petitioner's ADA claims. *Id.* at 32a-37a.

The court of appeals affirmed. Pet. App. 1a-6a. Relying on its recent decision in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, No. 97-1943 (Jan. 8, 1999), the court held that the "disability" determination must "'take into consideration mitigating or corrective measures utilized by the individual.'" Pet. App. 4a. The court noted petitioner's doctor's testimony that "[petitioner] 'functions normally doing everyday activity that an everyday

[Footnote continued from previous page]

for UPS because his blood pressure exceeded 140/90 or 140/80." Ms. Sloan testified that UPS "ideally" prefers blood pressure of 140/90 for its drivers (J.A. 88a), but she also made clear that petitioner was required to satisfy only the DOT standard of 160/90 in order to work for UPS. J.A. 85a-87a. And in any event, the record is clear that Ms. Sloan did not make the decision to terminate petitioner's employment. J.A. 84a, 103a.

person does,” and concluded that his “high blood pressure does not substantially limit a major life activity.” *Id.* The court also held that petitioner was not “regarded as” disabled, rejecting his claim that UPS acted for “discriminatory and stereotypical” reasons. *Id.* at 5a. Instead, the court explained, “UPS terminated [petitioner] because his blood pressure exceeded the DOT’s requirements.” *Id.*

SUMMARY OF ARGUMENT

I. The first prong of the ADA’s definition of “disability” asks whether an impairment “substantially limits” the “major life activities” of the impaired individual. 42 U.S.C. § 12102(2)(A). That statutory text requires a functional analysis of the limitations actually imposed on the individual’s major life activities, and thus compels consideration of any ameliorative measures or adjustments that in reality serve to limit or control the real-world impact of the impairment. Petitioner’s contrary interpretation, which seeks to ignore the actual impact of his impairment in favor of its hypothetical effects, is irreconcilable with the statutory text. Congress mandated an inquiry into whether the impairment “substantially limits” the individual’s activities, not whether the impairment “would” or “might” substantially limit those activities in some hypothetical world. Petitioner’s attempt to rewrite the unambiguous statutory text should be rejected.

The ADA’s structure and design confirm this plain-meaning interpretation of the statute. In its legislative findings, Congress described “individuals with disabilities” as persons whose impairments are “*beyond the[ir] control*.” 42 U.S.C. § 12101(a)(7) (emphasis added). Moreover, by mandating that the prong-one disability determination be made “with respect to an individual” and by reference to the limitations imposed on the “major life activities” of that individual, Congress made clear that the prong-one analysis looks to the real-world limitations actually suffered by the individual. The overall structure of the disability definition further bolsters this conclusion. Unlike prong one of the definition, prongs two and three (which apply to individuals who have a

“record of” or are “regarded as” having a substantially limiting impairment) expressly extend ADA coverage to specified individuals whose impairments are not in reality substantially limiting, demonstrating that Congress knew how to achieve that result when it intended to do so. And Congress’s finding that the ADA would protect “43 million” Americans reflects a real-world, functional definition of disability; petitioner’s contrary interpretation would yield a far larger population of theoretically “disabled” individuals.

Petitioner’s interpretation would also lead to absurd and unworkable results. For example, petitioner’s contention that prong one precludes consideration of the effects of medications and other ameliorative measures would necessarily exclude from the disability calculus the *harmful* (as well as beneficial) effects of such measures, even when the treatment for a non-disabling condition itself imposes substantial limitations. Moreover, petitioner’s interpretation would impose on employers the impossible burden of attempting to guess whether an individual *would* be substantially limited *if* existing ameliorations were ignored—an inquiry that in many instances would be difficult or impossible to resolve short of litigation, but that the employer would be required to undertake on pain of substantial liability for an incorrect guess. This result cannot be squared with Congress’s goal of providing “clear” and “consistent” standards in the ADA. 42 U.S.C. § 12101(b)(1) & (2).

Unlike petitioner’s counter-textual reading of prong one, the plain-meaning interpretation is entirely consistent with the design and purpose of the ADA. Far from creating a “Catch-22,” as petitioner would have it, the plain-meaning interpretation advances the statutory scheme by extending ADA protection to all those who are truly disabled, while at the same time avoiding creation of a privileged class of specially advantaged, but not substantially limited, individuals. Indeed, it is petitioner’s interpretation that would create the strange anomaly of treating individuals with controlled impairments more favorably than their colleagues who are in reality equally or less “able” but who cannot take medication

or otherwise ameliorate their impairments. Moreover, petitioner's interpretation would frustrate the ADA's goals by funneling limited resources away from the truly disabled in order to benefit those whose impairments are not in fact disabling and are not perceived as such. The obligation to "accommodate" the disabled is not absolute, and thus the vast expansion of the class of "disabled" entailed by petitioner's reading of prong one would correspondingly increase the likelihood that accommodations requested by the truly disabled will be deemed an undue hardship.

The pre-ADA understanding of the Rehabilitation Act is consistent with the plain-meaning interpretation of prong one. While the issue of ameliorative measures does not appear to have arisen with much frequency during this time period, pre-ADA cases and agency statements—including a ruling by the EEOC itself—indicate that the Rehabilitation Act was understood to require consideration of ameliorative measures as part of the "handicap" determination.

The legislative history of the ADA does not support petitioner's counter-textual reading of prong one. In the first place, there is no need to consult legislative history, because prong one yields only one plausible interpretation. In any event, the plain-meaning interpretation finds ample support in the legislative history. The Senate Report clearly contemplated that "controlled" impairments would be evaluated in their ameliorated state, and that prong one requires an examination of the restrictions actually imposed on an impaired individual's activities. Petitioner relies on short passages from two of the four House Reports, but those passages are contradicted by other portions of the House Reports, by the Senate Report, and by the statutory text.

Petitioner also relies heavily on the EEOC's interpretive guidance, which purports to preclude consideration of "mitigating measures." Because that guidance is contrary to the plain meaning of prong one, it must be rejected. Moreover, the guidance would not be entitled to deference even if there were some lack of clarity in the statutory text. As a mere interpretive rule, the guidance receives only such judi-

cial consideration as its reasoning merits, but the guidance is internally inconsistent, conflicts with prior and subsequent agency determinations, and makes no effort to address the glaring flaws in its conclusion that "mitigating" measures should be ignored. Accordingly, no deference is due.

II. The third prong of the ADA's definition of disability asks whether the individual is "regarded as" having an impairment that substantially limits major life activities. 42 U.S.C. § 12102(2)(A) & (C). Contrary to petitioner's contentions, UPS did not regard him as substantially limited in the major life activity of working. Rather, UPS discharged him solely because his blood pressure exceeded DOT limits and precluded him from obtaining a valid DOT health card, which was a prerequisite to the job of UPS mechanic. Petitioner points to no evidence that his inability to obtain a UPS health card was perceived as a substantial limitation on his ability to work, and all the available evidence is to the contrary. Indeed, petitioner has worked as a mechanic for 22 years despite his lack of a valid DOT health card, and he obtained another mechanic's job within a few weeks of leaving UPS.

ARGUMENT

I. INDIVIDUAL ADJUSTMENTS AND AMELIORATIONS CANNOT BE IGNORED IN DETERMINING WHETHER AN IMPAIRMENT "SUBSTANTIALLY LIMITS" AN INDIVIDUAL'S ACTIVITIES

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court found it unnecessary to consider the argument that the determination of "disability" status under the ADA should be "assessed without regard to available mitigating measures."

Id. at 2206.² This case presents that issue squarely, and UPS submits that the proper resolution is clear: The plain meaning of the statute requires a determination based on the real-world impact of an impairment—including the effects of any ameliorative measures or adjustments actually taken or made by the impaired individual—and does not permit courts or agencies to ignore reality in favor of speculative hypotheses about what impact an impairment could or would have in a different world. That plain-meaning interpretation is consistent with the structure and purpose of the ADA and with the preexisting administrative and judicial interpretation of the relevant statutory language, and is not contradicted by the legislative history of the Act. The counter-textual interpretation advanced by petitioner and the EEOC must be rejected.

A. The Plain Meaning Of The Statutory Text Compels Consideration Of Ameliorating Factors In The “Disability” Analysis

1. The Statutory Text Requires Consideration of Ameliorating Factors

The first prong of the ADA’s definition of disability states that “[t]he term ‘disability’ means, with respect to an individual, . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2)(A). On its face, this language clearly contemplates an examination of the extent to which an individual plaintiff’s impairment actually constrains his or her ability to engage in major life activities. An individual whose impairment is ameliorated or controlled to such an

² Petitioner nonetheless claims (Pet. Br. 16-17) that *Bragdon* supports his interpretation of the ADA. To the contrary, if *Bragdon* sheds any light on this case, it supports the court of appeals’ holding that the disability determination must be made with reference to the actual *results* of an impairment. See 118 S. Ct. at 2206 (an impaired individual is disabled if “significant limitations *result from* the impairment”) (emphasis added).

extent that it has no substantially limiting effect simply does not have an “impairment that substantially limits . . . major life activities.” “[W]here, as here, the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

Petitioner contends, however, that prong one of the definition does not contemplate a real-world inquiry into whether the impairment “currently or actually substantially limits” the impaired individual’s major life activities. Pet. Br. 17. Instead, according to petitioner, an impairment’s limitations must be analyzed in the abstract, and any ameliorative measures or adjustments that in reality eliminate or control the effects of the impairment must be ignored. Thus, petitioner claims that his hypertension is a disability because “[w]ithout medication he *would* have to be hospitalized, *would* surely incur end organ damage, and [would] eventually die from the high blood pressure.” Pet. 7 (emphasis added). Similarly, the Solicitor General argues that petitioner “*is disabled*” because his impairment “*would* substantially limit him in [his] major life activities” but for the fact that it is medically controlled. U.S. Br. 20 (emphasis added). Without doing violence to the statutory text, these hypotheses about what *would* happen if the facts were different than they are cannot suffice to prove that petitioner’s impairment “substantially limits” his “major life activities.”

Prong one is phrased in the present indicative—an “impairment that substantially limits . . . major life activities”—thereby making clear that the statute looks to the present, real-world limitations actually imposed on the individual’s activities as a result of the impairment. An inquiry into the *present* factual impact of an impairment necessarily requires consideration of the real-world effects of any ameliorative measures taken by the individual and any internal physical or mental adjustments that compensate for the impairment.

Petitioner’s definition, which looks to whether the individual *would* or *might* be substantially limited in circum-

stances other than those presented in the real world, assumes that Congress intended to use the conditional or subjunctive mood instead of the present indicative form of the verb.³ But Congress knows how to use the conditional or subjunctive when it means to refer to possible, potential, or counterfactual scenarios rather than focusing exclusively on actual reality—indeed, Congress did precisely that in other, contemporaneously enacted sections of this very Act.⁴ In prong one of the disability definition, by contrast, Congress elected not to use the subjunctive or its equivalent, instead adopting only the present indicative form of the verb. That choice has unambiguous significance, and must be given effect. *Cf. United States v. Wilson*, 503 U.S. 329, 333 (1992) (“Congress’ use of a verb tense is significant in construing statutes”).

Petitioner and the Solicitor General effectively ask this Court to rewrite prong one to encompass not only those impairments that do in fact “substantially limit[]” an individual’s major life activities, but also those impairments that “might” or “would” be substantially limiting if their effects

³ The indicative verb form “represents an attitude toward or concern with a denoted act or state *as an objective fact*.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1150 (1976) (emphasis added). The subjunctive mood, by contrast, “represents an attitude toward or concern with a denoted act or state *not as fact* but as something entertained in thought as contingent or possible.” *Id.* at 2276 (emphasis added); *see also id.* (defining “subjunctive equivalent” as “a verb phrase formed in English with a modal auxiliary (as *shall, should, may, might*) and functioning in a manner comparable to the subjunctive mood”).

⁴ *See, e.g.*, 42 U.S.C. § 12147(a) (“alterations . . . that affect or could affect . . . usability”) (emphasis added); 42 U.S.C. §§ 12162(e)(2)(B)(i) & 12183(a)(2) (same); 42 U.S.C. § 12112(b)(5)(A) (“would impose”); 42 U.S.C. § 12112(d)(3)(B)(ii) (“might require”); 42 U.S.C. §§ 12142(c)(2)(A) & 12184(c)(1) (“would significantly alter”).

had not been ameliorated or controlled.⁵ This Court, however, “ordinarily resist[s] reading words or elements into a statute that do not appear on its face.” *Bates v. United States*, 118 S. Ct. 285, 290 (1997). Petitioner and his *amici* point to nothing in the statute’s text or structure that would justify a departure from that principle here.

Petitioner’s preferred reading of prong one is also inconsistent with the statute’s requirement that the disability determination must be made “with respect to [the impaired] individual” and the “major life activities of such individual.” This language requires a showing that the impairment has a substantial impact *on the activities of the individual* claiming relief under the Act, not on some hypothetical individual who cannot or does not ameliorate the effects of his or her impairment. Rather than an abstract, hypothetical consideration of the impairment itself, divorced from reality, therefore, the statute contemplates a real-world analysis of the impaired individual and his or her activities, an analysis that necessarily encompasses the extent to which the individual controls or ameliorates the impairment’s impact on his or her major life activities. Petitioner engages in his “major life activities” *in the real world*, not in the nonexistent world described by his hypothetical scenarios, and the record is clear that he does not in fact suffer any substantial limitations on his ability to engage in those activities.

⁵ The cases relied upon by petitioner and his *amici* seek to rewrite the statutory text in the same manner. *See, e.g., Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 630 (7th Cir. 1998) (plaintiff “would become ill without medication”) (emphasis added); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 856, 863, 866 (1st Cir. 1998) (ignoring medication because plaintiff “would die in the absence of his insulin injections”) (emphasis added); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 523 (11th Cir. 1996) (“in the absence of mitigating measures, [plaintiff’s impairment] would substantially limit her major life activities”) (emphasis added).

In the final analysis, petitioner and his *amici* are unable to come to grips with the fundamental flaw in their proffered interpretation of prong one. The words used by Congress must be given their ordinary meaning. *Smith v. United States*, 508 U.S. 223, 228 (1993). The ordinary meaning of the phrase an "impairment that substantially limits . . . the major life activities of [an] individual" simply does not encompass an impairment that in reality imposes no meaningful limitations on the impaired individual. In petitioner's view, even an individual whose impairment has been permanently and substantially ameliorated by subconscious internal adjustments, surgery, or the like will continue to enjoy the special protections afforded by "disability" status. The "ordinary meaning" of the words used by Congress is directly to the contrary.

2. Structure and Context Confirm the Correctness of the Plain-Meaning Interpretation

The congressional findings set forth in the ADA provide further confirmation, if any were needed, that prong one requires consideration of the real-world impact of controlled impairments. In Section 2(a)(7) of the Act, Congress described "individuals with disabilities" as persons who have suffered from discrimination and limitations "based on characteristics that are *beyond the control* of such individuals" 42 U.S.C. § 12101(a)(7) (emphasis added). Congress's characterization of disabled individuals as persons whose limitations are "beyond the[ir] control" supports UPS's reading of prong one, and is directly contrary to petitioner's view that prong one extends to impairments that are not truly disabling because they are *within the control* of the impaired individuals.⁶

⁶ Petitioner's contrary interpretation would raise serious constitutional difficulties. Congress relied on Section 5 of the Fourteenth Amendment in applying the ADA to the States (see 42 U.S.C.

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Further support for this conclusion is provided by Congress's finding that the ADA would protect "43 million" disabled Americans. 42 U.S.C. § 12101(a)(1). This figure appears to have been based at least in part on 1980 census data regarding the number of disabled Americans, adjusted to reflect subsequent population growth and aging. See 135 Cong. Rec. 8901 (1989) (statement of Rep. Coelho). Significantly, those census data reflect the number of individuals who *actually* suffered from functional limitations, not those who *would* suffer such limitations if ameliorative measures were disregarded. See, e.g., U.S. Dep't of Commerce, Bureau of the Census, *Disability, Functional Limitation, and Health Insurance Coverage: 1984/85*, Series P-70, No. 8, at 2 (1986) (finding 37.3 million persons with "a functional limitation").

Indeed, these census figures were the product of survey questions that expressly sought information on the limitations actually imposed by *ameliorated* conditions. See *id.* at 47

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§§ 12101(b)(4), 12202), but there is no evidence or congressional finding suggesting that all persons whose controlled impairments are not in reality substantially limiting are members of a "discrete and insular minority" that has been subjected to widespread discriminatory treatment. See E. Harris, *Controlled Impairments Under The Americans With Disabilities Act: A Search For The Meaning Of "Disability,"* 73 WASH. L. REV. 575, 594-95 (1998). Extending ADA coverage to all such individuals would raise serious constitutional doubts. Compare *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 705-08 (4th Cir. 1999) (invalidating ADA regulation as beyond section 5 power, and criticizing Congress's attempt to "redefine" the disabled as a "discrete and insular minority"), with *Coolbaugh v. Louisiana*, 136 F.3d 430, 435-38 (5th Cir.) (upholding ADA because its scope is not disproportionately "sweeping"), *cert. denied*, 119 S. Ct. 58 (1998). The ADA can and should be construed to avoid these doubts about its constitutionality. See, e.g., *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

("Does [the individual] have difficulty seeing words and letters in ordinary newspaper print *even when wearing glasses or contact lenses* if [he or she] usually wears them?"; "[d]ifficulty hearing . . . *[u]sing a hearing aid*"; "[i]f person uses special aids, ask about the ability to do the activity *while using the special aids*"). Congress's finding of 43 million disabled Americans thus confirms that disability status must be determined based on the real-world impact of impairments, not through a hypothetical inquiry that ignores the effects of individual ameliorative measures. Petitioner's contrary approach would yield a "disabled" population in excess of 100 million, a far cry from the "discrete and insular minority" that Congress sought to protect. See Br. *Amici Curiae* of American Trucking Ass'n, *et al.*, at 19-21; Br. *Amicus Curiae* of Society for Human Resource Management at 4-7; see also Br. for Respondent United Air Lines, Inc., in No. 97-1943 ("97-1943 UAL Br.") at 10-11, 13, 20-21 (individuals disabled by vision impairments alone would exceed the 43 million figure if ameliorative measures were ignored).

Petitioner contends that the ADA's structure supports his interpretation of prong one. He notes that the second and third prongs of the disability definition include within the category of disabled individuals those persons who do not *actually* have a substantially limiting impairment (and thus do not satisfy prong one) but who instead have a "record of" or are "regarded as" having such an impairment. Pet. Br. 19 (citing 42 U.S.C. § 12102(2)(B) and (C)). The fact that prongs two and three *expressly* extend coverage to certain individuals whose impairments are not in fact substantially limiting, however, hardly supports petitioner's argument that Congress *implicitly* achieved that same result in prong one. To the contrary, it demonstrates that Congress knew how to protect individuals who are not in reality substantially limited when it intended to do so, and that it did not do so in prong one of the definition (where it expressed no such intent).

Equally unpersuasive is petitioner's reliance on the fact that the ADA expressly contemplates consideration of "reasonable accommodations" in determining whether an

individual is "qualified" for employment. Pet. Br. 19-20; see also U.S. Br. 13-15. As petitioner correctly concedes, "reasonable accommodations" are, by definition, mitigating measures supplied *by the employer* in response to the needs of a disabled individual. Pet. Br. 19-20; see 42 U.S.C. §§ 12111(9), 12112(b)(5)(A). But the fact that Congress required consideration of employer-provided, statutorily mandated measures in determining whether a disabled individual is "qualified" does nothing to demonstrate that the individual's own preexisting efforts to control and minimize the effects of an impairment should be ignored in the disability determination. Rather, the obvious explanation for the reference to reasonable accommodations at this stage of the inquiry is that, in contrast to ameliorative measures undertaken by individuals themselves, reasonable accommodations are supplied by employers *if* an individual has been shown to be disabled. The disability determination must be made "with respect to" *the individual* as he or she functions in the real world, not by reference to whatever mitigating measures a particular employer might provide in the context of a specific job *if* an employee or applicant were found to be disabled. 42 U.S.C. § 12102(2)(A). Thus, petitioner's "structural" arguments are without merit.

3. Petitioner's Interpretation Would Lead to Absurd and Unworkable Results

Petitioner's interpretation would lead to unworkable results that are impossible to reconcile with the manifest purpose and structure of the ADA. For example, petitioner's interpretation would require courts and agencies to ignore the adverse effects of medications or other ameliorative measures in determining whether an individual is disabled. Indeed, the Solicitor General attempts to make a virtue of this fact, trumpeting the purported wisdom of ignoring "the extent to which the medications or devices impose new limitations or uncertainty themselves." U.S. Br. 15. But as one of petitioner's *amici* observes, "for many diseases which are treated with medication . . . the treatment, although potentially life-saving, can be more disabling than the untreated disease."

Br. *Amicus Curiae* of American Diabetes Ass'n at 12.⁷ Under petitioner's reading of prong one, such consequences would have to be ignored, because the effects of medications and other ameliorative measures purportedly cannot be considered in making the disability determination. Pet. Br. 10. Congress cannot possibly have intended to achieve such an absurd result.⁸

In addition, petitioner's interpretation would lead to awkward difficulties and uncertainty in determining whether an individual is disabled. In many instances, the attempt to determine the hypothetical extent of an impairment's limitations in the absence of existing ameliorating measures would depend entirely on highly speculative and undoubtedly conflicting expert medical testimony about abstract possibilities and predictions. Employers and others obligated to comply with the ADA on a day-to-day basis are in no position to determine the hypothetical but nonexistent effects of an employee's controlled impairments. Indeed, to the employer, individuals whose impairments are controlled may not appear to be impaired in any way, let alone "substantially limit[ed]" in any major life activities. As a practical matter, the employer will have no feasible or reliable basis for determining (short of litigation) whether such individuals *would* be sub-

⁷ Accord, e.g., AMERICAN MEDICAL ASSOCIATION, ESSENTIAL GUIDE TO HYPERTENSION 112-34 (1998) (discussing potentially severe side effects of hypertension medications); R. Irwin *et al.*, *Psychosis following acute alteration of thyroid status*, 31 AUST. N.Z. J. PSYCH. 762, 762-63 (1997) (psychotic reaction to hormone treatments for Grave's disease); see also Harris, *supra*, 73 WASH. L. REV. at 599.

⁸ Petitioner may attempt to avoid this absurdity by asserting that courts should consider the *harmful* effects of ameliorative measures in making the disability determination, while at the same ignoring the *beneficial* effects of such measures. Needless to say, that internally inconsistent and result-oriented position is equally indefensible. See pp. 40-41, *infra*.

stantially limited if they ceased their ameliorative measures—yet in petitioner's view, the ADA compels employers to make precisely that impossibly complex and speculative determination on a daily basis.

To give just one example, osteoporosis is a potentially disabling condition that can be treated with a dietary, vitamin, exercise, and lifestyle regimen that enables individuals to minimize any impairment. D. Cumming & C. Cumming, *Should your patient do with—or without—it?*, 38 CONSULTANT 2417, 2420-26 (1998); P. Taxel, *Osteoporosis: Detection, prevention, and treatment in primary care*, 53 GERIATRICS 22, 37-38 (Aug. 1998). Must an employer whose employee has mild osteoporosis attempt to imagine how much more severe the condition might be if the employee drank less milk and stopped exercising? S. Erickson & T. Sevier, *Osteoporosis in Active Women: Prevention, Diagnosis, and Treatment*, 25 PHYSICIAN & SPORTSMEDICINE 61, 67 (1997). Countless other conditions would entail similarly absurd exercises under petitioner's view of the statute.

This already unworkable burden would be further exacerbated in instances of internal adaptations or "mitigations," where the difficulties inherent in attempting to guess at the extent of hypothetical limitations would be compounded by the absence of any standards for identifying those internal adaptations that can be considered and those that must be ignored. For example, if an individual suffers a stroke that results in blocked brain synapses and a temporary inability to speak, is the individual disabled even after relearning to speak reasonably well, on the ground that the individual's brain has merely "mitigated" the effects of the impairment by developing new neural pathways to bypass damaged areas? See *Brain plasticity brings about stroke recovery*, 20 DIAG. IMAGING, Dec. 1, 1998, at 21; see also *Speech after stroke*, MAYO CLINIC HEALTH LETTER, August 1996, at 1-3. If an individual with dyslexia ultimately develops the ability to read at an above-average level through mental adaptations that mitigate the effects of the impairment, must those adaptations be disregarded for purposes of the disability determi-

nation? See J. Rumsey, *The Biology of Development Dyslexia*, 268 J.A.M.A. 912, 913-15 (1992); B. Upbin, *Rose-colored glasses*, FORBES, Dec. 4, 1995, at 294, 295. Petitioner's interpretation of the statute offers no guidance on these and countless similar questions, but employers would be forced to resolve them (on pain of substantial liability for damages and attorney's fees if they guess wrong).

In many such instances, in fact, it will be difficult or impossible to measure the effects of such internal adaptations with accuracy, or even to determine whether they have occurred. By necessitating such speculative and difficult inquiries aimed at permitting courts to disregard the present realities of an individual's circumstances, petitioner's interpretation conflicts with the express purpose of the ADA, which was "to provide a *clear* and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" pursuant to "*clear*" and "*consistent*" standards. 42 U.S.C. § 12101(b)(1) & (2) (emphasis added).

4. The Plain-Meaning Interpretation Comports with the Policy of the ADA

The plain-meaning interpretation of prong one is wholly consistent with the policies expressed in the ADA, and provides full protection to those individuals who in fact suffer from truly disabling conditions (as well as those who have a "record of" or are "regarded as" having such conditions). As noted above, Congress was acting in response to a history of discrimination based on impairments that are "beyond the control of" impaired individuals (42 U.S.C. § 12101(a)(7)); individuals with controlled and ameliorated impairments, by contrast, have not traditionally been subjected to widespread discrimination, precisely because their impairments *are* under control and do not impose substantial limitations. It is telling in this regard that the issue of ameliorating conditions arises most frequently in the context of narrow job categories (such as airline pilots, truck drivers, police, and firefighters) that entail heightened safety concerns. Absent such unique concerns, the vast majority of employers do not make employ-

ment decisions on the basis of corrected or ameliorated impairments (such as myopia, high blood pressure, and the like) that impose only insubstantial limitations, if any. And of course, if an employer does discriminate against such individuals on the basis of irrational myths, stereotypes, or misconceptions about their abilities, the "regarded as" prong provides an ADA remedy. See *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

Petitioner and his *amici* make several attempts to conjure up some sort of tension between the plain meaning of prong one and the overall purpose of the ADA, but their efforts are wholly unsuccessful. For example, they contend that the plain-meaning interpretation creates a "Catch-22" because some individuals with corrected impairments will be excluded from coverage under the ADA even though their impairments render them unqualified for certain kinds of jobs. The fact that the ADA does not protect every impaired individual is neither surprising nor troubling, however, but is instead entirely in keeping with the manifest purpose of the Act. Congress enacted the Americans with *Disabilities* Act, not the Americans with *Impairments* Act, and it expressly limited coverage under prong one to those individuals whose impairments result in "substantial[]" limits on their major life activities. In keeping with that understanding of the Act, the plain-meaning interpretation of prong one extends the protections of the ADA to all individuals who are truly disabled, while avoiding creation of a privileged class of fully "abled" individuals who (by virtue of controlled and non-disabling conditions) would be entitled to special statutory protections and preferences that are denied their unimpaired or slightly impaired colleagues.

Contrary to petitioner's implicit assumption, moreover, the ADA clearly contemplates that individuals whose impairments disqualify them from certain jobs may nonetheless fall outside the scope of the ADA. Consider, for example, an individual who is unable to take hypertension medication and whose blood pressure is consistently above 160/90, resulting in the same minimal limitations as those imposed on peti-

tioner. Despite their identical abilities to engage in "major life activities," petitioner claims that only he, and not this equally limited individual, would be entitled to ADA protection. Similarly, numerous individuals have minor, unameliorated impairments that nonetheless disqualify them from certain types of jobs.⁹ Petitioner offers no justification for construing prong one to create a privileged class of protected individuals whose impairments are not in reality disabling, while denying such privileged status to other impaired individuals who are equally or even more limited in their major life activities.

By extending the protections of the ADA to individuals whose impairments are largely or fully ameliorated and are thus not "beyond the[ir] control" (42 U.S.C. § 12101(a)(7)), petitioner's interpretation would in fact frustrate the ADA's goals by funneling limited resources away from the truly disabled. Under the Act, an employer's obligation to provide "reasonable accommodation" is not unlimited, and ceases at the point that providing such accommodations would constitute an "undue hardship." 42 U.S.C. § 12112(b)(5)(A); *see also* 42 U.S.C. § 12182(b)(2)(A)(iii), (iv) & (v) (similar provisions governing public accommodations). The larger the class of employees entitled to demand "reasonable accommodation," the greater the resulting burden and risk of conflicting demands, with the consequence that accommodations required by the truly disabled will more often be deemed to constitute "undue hardship[s]."¹⁰ Thus, peti-

⁹ *See, e.g., Reeves v. Johnson Controls World Servs.*, 140 F.3d 144 (2d Cir. 1998) (agoraphobia); *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (carpal tunnel syndrome); *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (mild hemophilia), *cert. denied*, 519 U.S. 1093 (1997); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1416-20 (10th Cir. 1992) (sensory deficit in two fingers); *see also* cases cited in notes 25 and 27, *infra*.

¹⁰ Even individuals whose impairments are under control (and are therefore not substantially limiting) may well be in a position to

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tioner's interpretation would provide an economic windfall (in the form of an employment preference and the right to demand "accommodation") to an undeserving class of individuals at the expense of the truly disabled. *See Harris, supra*, 73 WASH. L. REV. at 584-86, 607-08. As explained in a leading case construing the parallel provision of the Rehabilitation Act, Congress intended to protect only the "truly disabled," and "[i]t would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared." *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986).

It is no response to assert that the ADA should be "broadly" or "liberally" construed in view of its "remedial" purpose. Congress expressed two equally important goals in prong one: Individuals who suffer from substantial limitations on their major life activities by virtue of their impairments should be treated as disabled, and persons who do not suffer from such limitations should not be so treated (unless, of

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demand (and receive, under petitioner's reading of the ADA) costly accommodations that could potentially conflict with the accommodation needs of truly disabled employees. For example, individuals whose controlled impairments would otherwise disqualify them from a narrow category of jobs by virtue of government safety regulations might demand difficult and contentious restructuring of work and leave schedules, modifications to job duties (at the expense of other, perhaps also "disabled," employees), the hiring of additional employees, or other "accommodations" to their non-disabling conditions. 42 U.S.C. § 12111(9). By vastly increasing the number of individuals protected by the ADA, petitioner's interpretation would dramatically compound the difficulties faced by employers seeking to respond to often conflicting demands for "reasonable accommodation," and would increase the likelihood that employers will find themselves unable (at least without "undue burden") to comply with the accommodation demands of the truly disabled.

course, they have a "record of" or are "regarded as" having such limitations). "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987); see *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-100 (1991).

Nor is there any substance to the purported concern that denial of ADA protection to individuals with controlled impairments will create an incentive for individuals to cease their ameliorative efforts in order to obtain protection under the Act. It begs credulity (and is insulting to the truly disabled) to suggest that individuals will voluntarily suffer "substantial[] limits" on "major life activities" merely in order to achieve a litigation advantage under federal law. And even if some hypothetical individual were inclined to contemplate such a bizarre course of action, the potential payoff would be far from clear: Failure to ameliorate might make it easier for this hypothetical individual to demonstrate the existence of a disability, but it would make it correspondingly more difficult to prove that the individual is "qualified." See generally Harris, *supra*, 73 WASH. L. REV. at 600-01.

Moreover, the parade of horrors described by petitioner's *amici* largely ignores the mechanisms that Congress enacted for preventing discrimination against individuals who actually suffer from, have a record of, or are perceived as having substantially limiting impairments. Thus, for example, the Solicitor General asserts (U.S. Br. 14) that employers would be free to discharge or refuse to hire individuals who must take medication on the job in order to control their impairments. To the contrary, however, individuals who require accommodation to their need for medication in order to work might well satisfy prong one of the disability definition, because their need for such accommodation could render them substantially limited in the major life activity of

working.¹¹ And employer conduct of this nature could also provide the basis for a claim of "regarded as" disability under prong three of the statutory definition.

The Solicitor General argues (U.S. Br. 15-16) that the plain-meaning interpretation of prong one should be rejected because it would lead to a "strange instability" in the definition of disability. The fact that the effectiveness of some treatments may vary with time, however, is hardly sufficient justification for rejecting a real-world analysis in favor of a speculative inquiry into the hypothetical effects of an impairment based on the false assumption that no ameliorating measures have been taken. Nor does the Solicitor General's preferred reading of the statute avoid the supposedly pernicious result of a "moving target of disability." U.S. Br. 16. The effects of many impairments vary widely over time, but the statute nonetheless requires an individualized assessment of the extent to which those impairments actually result in substantial limitations.¹²

¹¹ Indeed, it is petitioner's interpretation of the statute that would lead to anomalous results of this kind, because petitioner construes "disability" to refer exclusively to *unameliorated* impairments and to exclude consideration of medications, treatments, and the like. The ADA prohibits discrimination "because of the *disability*" (42 U.S.C. § 12112(a) (emphasis added)), "by reason of such *disability*" (42 U.S.C. § 12132 (emphasis added)), and "on the basis of *disability*" (42 U.S.C. § 12182(a) (emphasis added)). Under petitioner's interpretation, employers and service providers would be prohibited from discriminating based on an individual's hypothetically unameliorated impairment, but would be free to discriminate on the basis of the individual's real-world ameliorating efforts, because those efforts form no part of petitioner's understanding of the term "disability."

¹² For example, one common form of multiple sclerosis (known as "relapsing-remitting MS") is characterized by periodic attacks followed by partial or total recovery. N. Holland et al., *Multiple Sclerosis: A Guide for the Newly Diagnosed*, at 4 (1996); accord *Secretary, U.S. Dep't of Housing & Urb. Dev. v. Jankowski Lee & As-*

Petitioner's impairment is a perfect example of this phenomenon. Individuals with hypertension may have widely varying blood pressure readings from time to time. See G. Parati *et al.*, *Clinical relevance of blood pressure variability*, 16 J. HYPERTENSION S25, S25 (Supp. 1998). Far from creating "strange instability," medication can actually reduce the variability of hypertension and other impairments. See J. Minami *et al.*, *Comparison of 24-hour Blood Pressure, Heart Rate, and Autonomic Nerve Activity in Hypertensive Patients Treated With Cilnidipine or Nifedipine Retard*, 32 J. CARDIOVASCULAR PHARMACOLOGY 331, 331-36 (1998); J. Walsh, *Psychopharmacological treatment of bipolar disorder*, 8 RESEARCH ON SOC. WORK PRAC. 406, 409-10 (1998) (medication can moderate mood swings caused by manic depression). And of course, if the effects of an individual's impairment and ameliorating measures are sufficiently variable that the individual's ability to work or engage in other major life activities is substantially limited, that individual is disabled within the meaning of prong one.¹³

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socs., 1995 WL 399384, at *1-2 (EEOC June 30, 1995). Numerous other impairments, such as bipolar disorder (see A. Frances *et al.*, *The Expert Consensus Guidelines for Treating Depression in Bipolar Disorder*, 59 J. CLINICAL PSYCH. 73, 74 (Supp. 4 1998)) and arthritis (see A. Silman, *Problems Complicating the Genetic Epidemiology of Rheumatoid Arthritis*, 24 J. RHEUMATOLOGY 194, 194-96 (1997)), also fluctuate widely in severity over time. See also 63 Fed. Reg. 57190, 57192 (1998) ("Disability is a contextual variable, dynamic over time and circumstance.").

- ¹³ Various arguments advanced by petitioner and his amici proceed from the assumption that the plain-meaning interpretation would preclude all persons with controlled impairments from satisfying the requirements of prong one. See, e.g., Br. of Amici AIDS Action *et al.* at 21-23 (arguing that plain-meaning interpretation should be rejected because treatments do not necessarily eliminate all substantially limiting effects). That assumption is incorrect. Individuals whose ameliorated impairments still result in substantial

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B. The Historical Understanding Of The Rehabilitation Act Confirms The Correctness Of The Plain-Meaning Interpretation

As this Court observed in *Bragdon v. Abbott*, "[t]he ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973" 118 S. Ct. at 2202. Accordingly, the administrative and judicial interpretations of the Rehabilitation Act provide guidance in interpreting the ADA's definition of disability. *Id.* at 2208; see also *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). In this case, those sources provide additional support for the plain-meaning interpretation of prong one.

1. Judicial Interpretations of the Rehabilitation Act Prior to the ADA

The few pre-ADA cases that actually addressed this issue under the Rehabilitation Act took the effects of ameliorative measures into account in determining whether a plaintiff was "handicapped." For example, in *Trembaczynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987), the court rejected a Rehabilitation Act claim brought by individuals who were barred from employment as full-time police officers because of their vision impairments. The court held that "Plaintiffs have failed to allege they are 'individuals with handicaps,'" because "[t]hey allege their vision is correctable to 20/20." *Id.* at *5. The court relied on and quoted with approval from an earlier Rehabilitation Act decision that applied the same reasoning. *Id.* at *4 (quoting *Padilla v. City of Topeka*, 708 P.2d 543, 550 (Kan. 1985)). The *Padilla* court had rejected a virtually identical claim, explaining:

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limitations (either because the impairment is not fully treatable or because the amelioration itself results in substantial limitations) are disabled under the plain meaning of prong one.

With corrective lenses, plaintiff's vision is 20/20. Plaintiff has worn glasses since his grade school days and testified to no problems or limitations in his activities. . . . Plaintiff has a visual impairment, but he has failed to meet the threshold requirement that he [be] a handicapped person [under the Rehabilitation Act].

708 P.2d at 550 (emphasis added). See also *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 & n.16 (5th Cir. 1993) (citing *Collier v. City of Dallas*, No. 86-1010 (5th Cir. Aug. 19, 1986), for the proposition that "[t]his court has previously held that a person is not handicapped if his vision can be corrected to 20/200").

A number of other pre-ADA cases reflect judicial consideration of ameliorative measures as part of the "handicapped" determination, although in these cases the plaintiffs were found to be handicapped even in their ameliorated states. Thus, for example, in *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), the court held that the plaintiff's "epilepsy substantially limits her ability to work" because "[e]ven though medication controls her seizures, federal and state regulations and policies restrict the types of jobs available to her." *Id.* at 574 (emphasis added). Accord *Pineiro v. Lehman*, 653 F. Supp. 483, 490 (D.P.R. 1987) (plaintiff with epilepsy-like condition was handicapped because "he suffered a fourth seizure . . . while taking medication (Dilantin) intermittently for the previous two years") (emphasis added).

Despite this line of authority, petitioner's amici contend that the judicial construction of the Rehabilitation Act actually supports their interpretation of the ADA. The Solicitor General relies (U.S. Br. 12 n.5) on *Reynolds v. Brock*, *supra*, but as discussed above, the *Reynolds* court quite clearly evaluated the plaintiff in her medicated state (see 815 F.2d at 574), an approach that is directly at odds with the theory advanced by petitioner and his amici. The Solicitor General also cites *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983), and *Longoria v. Harris*, 554 F. Supp. 102 (S.D. Tex. 1982), but in both of those cases there was no dispute over the "handicapped" issue and thus the courts had no

occasion to, and did not, address it. See 716 F.2d at 230 (handicap issue "undisputed"); 554 F. Supp. at 102-03 (parties "stipulated to the facts," including that plaintiff "had his right leg amputated below the knee cap in 1969 and therefore is a handicapped individual"). The cases cited by petitioner's other amici suffer similar flaws. Many are completely irrelevant because they were decided after enactment of the ADA in July 1990 and thus shed no light on Congress's understanding of the language incorporated into the ADA. Several of the remaining cases actually take ameliorative measures into account,¹⁴ and the others either do not address the significance of ameliorative measures at all,¹⁵ or involve stipulations or admissions of handicapped status and thus do not decide the question at issue here.¹⁶ Accordingly, the pre-ADA judicial construction of the Rehabilitation Act reveals that courts considered the effects of ameliorative measures in assessing whether an individual was "handicapped" under that Act.

¹⁴ See, e.g., *Davis v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988) (finding plaintiff handicapped as "[a]n insulin-dependent diabetic") (emphasis added), *aff'd*, 865 F.2d 592 (3d Cir. 1989); *Akers v. Bolton*, 531 F. Supp. 300, 304 (D. Kan. 1981) (finding that epilepsy medications "are another likely component in the link between epilepsy and school problems").

¹⁵ See, e.g., *Kohl v. Woodhaven Learning Ctr.*, 865 F.2d 930, 935 (8th Cir. 1989); *Mantolete v. Bolger*, 767 F.2d 1416, 1420, 1421-24 (9th Cir. 1985); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

¹⁶ See, e.g., *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) ("[i]t is not disputed that . . . [plaintiff] is a 'handicapped person' under the Act"); *Sharon v. Larson*, 650 F. Supp. 1396, 1401, 1402 (E.D. Pa. 1986) ("[i]t is not disputed that [plaintiff] is handicapped").

2. Administrative Interpretations of the Rehabilitation Act Prior to the ADA

In a surprising omission from his brief, the Solicitor General fails to inform the Court that, prior to the adoption of the ADA, the EEOC itself interpreted the Rehabilitation Act to require evaluation of individuals *in their ameliorated state* for purposes of the "handicapped" determination.¹⁷ In *Kienast v. Frank*, No. 05900123, 1990 WL 711359 (EEOC Mar. 27, 1990), the EEOC rejected a claim under the Rehabilitation Act precisely because the individual had ameliorated the effects of her impairment and was therefore not handicapped:

In the present case, it is undisputed that appellant has a vision impairment which requires her to wear corrective lenses. Appellant does not claim that her vision problems were not *fully corrected by wearing the lenses*. Consequently, we find that appellant was not *substantially limited* in any of her major life activities and, therefore, she was not handicapped

1990 WL at *6 (emphasis added). This pre-ADA interpretation confirms the need to consider ameliorative measures as part of the prong-one inquiry.

The regulations issued under the Rehabilitation Act do not specifically discuss ameliorative measures. They do, however, provide support for the conclusion that the determination whether an individual's impairment is "substantially

¹⁷ Indeed, it appears that the United States has continued to maintain this position after the enactment of the ADA. See, e.g., *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (IRS argued that "plaintiff is not entitled to the protection of the Rehabilitation Act . . . because her condition is so easily correctable"); *Liff v. Secretary of Transp.*, 1994 WL 579912 at *3 (D.D.C. Sept. 22, 1994) (defendant argued that "because plaintiff's depression is generally controlled by medication, her impairment does not substantially limit any of her major life activities"), *adopted*, 1995 WL 231246 (D.D.C. Feb. 21, 1995).

limit[ing]" is to be made by reference to the real-world impact of the impairment, not by consideration of a hypothetical and counter-factual scenario that ignores the effects of ameliorative measures. For example, in issuing its final rule implementing Section 504 of the Rehabilitation Act, the Department of Health, Education and Welfare ("HEW") "emphasized that a physical or mental impairment does not constitute a handicap" unless it "*results in a substantial limitation of one or more major life activities*." 42 Fed. Reg. 22676, 22685 (1977) (emphasis added); see 45 C.F.R. Pt. 84 App. A, subpart A, Definitions, ¶ 3 (1990). HEW's recognition that what matters are the *results* of the impairment is inconsistent with petitioner's interpretation, which ignores results and instead looks to theoretical possibilities that are admittedly *not* the true results of the impairment.

Similarly, the Department of Labor, which is charged with implementing Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, issued a new substantive regulation implementing Section 503 on April 16, 1976, shortly after the Rehabilitation Act had been amended to include the present definition of handicapped individual. See 41 Fed. Reg. 16147 (1976). This regulation states that "a handicapped individual is 'substantially limited' if he or she *is likely to experience difficulty* in securing, retaining or advancing in employment because of a handicap." 41 Fed. Reg. 16149 (emphasis added); see 29 C.F.R. § 60-741.2. The Department's regulations implementing Section 504 of the Rehabilitation Act are to the same effect, and also provide that "[s]ubstantially limits" means the degree that the impairment *affects* an individual . . . or *affects an individual's employability*." 45 Fed. Reg. 66706, 66710 (1980) (emphasis added). By emphasizing the plaintiff's need to show real-world *effects* resulting from the impairment, these regulations are necessarily inconsistent with the view that the real-world impact of ameliorative measures must be ignored. Accordingly, these contemporaneous regulatory interpretations of the Rehabilitation Act are consistent with the EEOC's pre-ADA decision to consider ameliorative measures in determining whether an individual

is "handicapped," and provide additional support for adhering to the same approach under the ADA.

C. The ADA's Legislative History Does Not Support Petitioner's Interpretation Of Prong One

Petitioner attempts to bolster his counter-textual reading of prong one by reference to the legislative history of the ADA. As this Court has repeatedly held, however, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989). The plain meaning and structure of the ADA preclude petitioner's attempt to substitute a hypothetical inquiry for the real-world analysis mandated by the statute, and accordingly there is no cause to consider legislative history in this case.

Even if the Court were to examine the legislative history, moreover, it would find no basis for discarding the plain-meaning interpretation in favor of petitioner's wholly implausible reading. Indeed, the Report submitted by the Senate Committee on Labor and Human Resources is wholly consistent with the plain-meaning interpretation of prong one, and is irreconcilable with petitioner's counter-textual reading of the ADA.

The Senate Report is laced with statements confirming that the prong-one definition focuses on the real-world effects, impacts, and results caused by an individual's impairment. For example, the Report describes individuals with disabilities as persons whose impairments "are *beyond the control* of such individuals," and makes clear that an impairment "does not constitute a disability under the first prong of the definition . . . unless its severity is such that it *results in* a 'substantial limitation of one or more major life activities.'" S. Rep. No. 101-116 at 15, 22 (1989) (emphasis added). Similarly, the Report emphasizes the need to examine the actual present restrictions felt by an impaired individual in making the disability determination: "A person is considered an individual with a disability for purposes of the first prong of the definition *when the individual's important life activi-*

ties are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." *Id.* at 23 (emphasis added). When the effects of an individual's impairment are eliminated through medication, diet, or subconscious adjustments, it simply cannot be said that the individual's "important life activities *are restricted*" in any meaningful sense.

Most saliently, the Senate Report expressly addresses the subject of controlled impairments in discussing the third, "regarded as" prong of the disability definition:

An[] important goal of the third prong of the definition is to ensure that persons with medical conditions that are *under control*, and that *therefore* do not *currently* limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

Id. at 24 (emphasis added). This passage clearly confirms that impairments are to be evaluated in their ameliorated or controlled state in determining whether they "currently limit major life activities," *i.e.*, in making the determination of actual disability under prong one. And importantly, the definitional language of the bill discussed in the Senate Report is identical in all respects to the definition ultimately adopted by Congress. Compare 42 U.S.C. § 12102(2) with S. 933, 101st Cong. § 3(2) (Aug. 30, 1989).

Petitioner attempts to downplay the significance of this passage, arguing that it is merely a reference to mild impairments that are not substantially limiting "even if the evaluation is made without considering mitigating measures." Pet. Br. 24. Petitioner's argument is unavailing. The Report plainly contemplates that prong one does not extend to impairments that are "under control" to such an extent that they do not "*currently* limit major life activities." Accordingly, the Report reflects clear disagreement with petitioner's argument that the ameliorative effects of measures taken to

control an impairment must be disregarded in performing the prong-one analysis.

Petitioner points to the Senate Report's statement that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116, *supra*, at 23. That language, however, will not bear the weight placed on it by petitioner. In the first place, the mere "availability" of mitigating measures is irrelevant to the disability determination under prong one. The statutory text requires an examination of the impaired individual as he or she is in the real world, not a speculative inquiry into what limitations *might* exist if "availab[le]," but unused, "mitigating" measures were to be taken.

Moreover, when read in context, the reference to "mitigating measures" was clearly not intended to preclude consideration of ameliorative actions actually taken by impaired individuals themselves in order to control their impairments. The Report refers only to "mitigating" measures "*such as reasonable accommodations or auxiliary aids.*" Those phrases are terms of art under the ADA, and refer exclusively to measures that could or must be taken by *employers* or other entities subject to the Act in order to permit an impaired individual to satisfy applicable qualification standards. See 42 U.S.C. §§ 12102(1), 12111(9), 12112(b)(5)(A), 12131(2), 12182(b)(2)(A)(iii); see also *id.* § 12182(b)(2)(A)(ii). Indeed, the Report emphasizes that ameliorating measures taken by impaired individuals themselves are *not* within the purview of "reasonable accommodation." S. Rep. No. 101-116, *supra*, at 33 ("The Committee wishes to make it clear that non job-related personal use items such as hearing aids and eyeglasses are not included in this [reasonable accommodation] provision."). Thus, the Report's reference to measures "such as reasonable accommodations or auxiliary aids" merely makes clear that the determination whether an impaired individual is "substantially limit[ed]" is to be made without consideration of any measures that could or would be taken by employers or other covered entities *after* it has been

determined that an individual is disabled. The disability determination is instead to be made with reference to current reality, precisely as the courts below held.

Petitioner also relies heavily on short passages in two of the four House Reports suggesting that persons with substantially limiting impairments may be disabled "even if the effects of the impairment are controlled by medication" or, in the case of a hearing impairment, "even though the loss may be corrected through the use of a hearing aid." H. Rep. No. 101-485(II) at 52 (1990); see also H. Rep. No. 101-485(III) at 28-29 (1990) (containing a garbled and ambiguous discussion of this issue).¹⁸ Those stray passages offer no explanation for the failure to adopt language to that effect in the statute itself, however, and they are inconsistent with other statements in the House Reports. See, e.g., H. Rep. No. 101-485(II) at 52 (impairment not disabling unless "it *results* in a 'substantial limitation of one or more major life activities,' which occurs "*when* the individual's important life activities *are* restricted") (emphasis added); H. Rep. No. 101-485(IV) at 36 ("These three prongs of the definition are intended to have the same meanings given to the corresponding provisions used in the definitions of the term 'individual with handicaps' in . . . the Rehabilitation Act . . ."). And of course, these passages also conflict with the Senate Report (as well as with the text of the ADA itself). Accordingly, petitioner's attempt to avoid the plain-meaning interpretation of prong one must be rejected.

¹⁸ Language to this effect does not appear in either the other two House Reports or in the final House Conference Report. See H. Rep. No. 101-485(I) (1990); H. Rep. No. 101-485(IV) at 36 (1990) (section-by-section analysis discussing definition of "disability" without purporting to exclude consideration of "mitigating measures"); H. Conf. Rep. No. 101-596 (1990).

D. The EEOC's Interpretation Is Not Entitled To Deference

Petitioner relies heavily on an "Interpretive Guidance" issued by the EEOC, which states that "[t]he determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j), at 348 (1998); *see also* 28 C.F.R. Pt. 35 App. A § 35.104; 28 C.F.R. Pt. 36 App. B § 36.104. Petitioner's reliance is misplaced, for several reasons.

First, an agency interpretation, no matter how authoritative, cannot override the plain meaning of a statute enacted by Congress. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions" that are determined to be "contrary to clear congressional intent" after applying "traditional tools of statutory construction." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 & n.9 (1984). In this case, "the text and reasonable inferences from it give a clear answer against the Government, and that . . . is the end of the matter." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (internal punctuation omitted).

Moreover, petitioner and his *amici* err in contending that *Chevron* establishes the appropriate framework for evaluating the agency materials at issue here. The EEOC statement relied upon by petitioner is not set forth in a substantive regulation having the force of law; rather, it is contained in an interpretive guidance that lacks binding effect and to which *Chevron* does not apply. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court declined to defer to an EEOC interpretation of this type, explaining that "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *Id.* at 141-42; *accord EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (holding that *General Electric Co. v. Gilbert* establishes "the proper deference to be

afforded the EEOC's guidelines"); *see also Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Batterton v. Francis*, 432 U.S. 416, 424-25 & n.8 (1977); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); K. Davis & R. Pierce, Jr., *ADMINISTRATIVE LAW TREATISE*, §§ 3.5, 6.3 at 236 (3d ed. 1994) ("the *Chevron* test does not apply to interpretative rules").

Petitioner and the Solicitor General argue that the interpretive guidance at issue here should be given heightened deference because it was purportedly issued pursuant to formal notice and comment procedures at the same time as the EEOC's regulations. But that argument is simply wrong, for several reasons. First, the interpretive guidance was not in fact "subject to the same notice and comment as the regulations." U.S. Br. 19. The EEOC's notice of proposed rule-making invited public comment on the agency's proposed "substantive regulations," which were to be issued pursuant to the mandate of the ADA. 56 Fed. Reg. 8578 (1991). The notice then went on to observe that the EEOC was "also issuing interpretive guidance," and invited comments only as to a *specific portion* of that guidance—the definition of "regarded as" disability—and *not* as to the discussion of prong one. *Id.*¹⁹ And the language upon which petitioner places principal reliance was not even contained in the version of the guidance published with the notice, but was instead added after the comment period had closed. *See* 97-1943 UAL Br. at 24-25.

¹⁹ The preamble to the EEOC's final rule confirms that the EEOC "solicited and considered public comment in the development of part 1630" (56 Fed. Reg. 35726 (1991) (emphasis added)) whereas the interpretive guidance was recognized to be separate and distinct from "part 1630." *Id.* ("The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 Therefore, part 1630 is accompanied by an appendix.") (emphasis added).

Regardless of the procedures attendant upon its issuance, moreover, it is undisputed that the interpretive guidance (like the other agency materials cited by petitioner) is nothing more than a non-binding interpretive statement rather than a formal, legally binding, substantive rule issued pursuant to express statutory authority. Indeed, the EEOC itself repeatedly emphasized that fact, taking great pains to distinguish between the "substantive regulations implementing title I" that were contained in part 1630 itself, and the "interpretive guidance" that "represents the Commission's interpretation of the issues discussed" and was set forth in a separate "appendix." 56 Fed. Reg. 35726 (1991). As this Court has explained, the crucial distinction between binding substantive rules and non-binding interpretive statements is that the former are issued pursuant to express statutory authority to "'implement' the statute" and "'have the force and effect of law,'" whereas the latter "are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)); see *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. at 99; *Batterton*, 432 U.S. at 425 n.8; see also Davis, *supra*, § 6.3. The EEOC's guidance falls in the latter category.

Petitioner and the Solicitor General nonetheless seek heightened deference here, relying on cases deferring to agencies' interpretations of their own regulations. Pet. Br. 28-29; U.S. Br. 18. That rule of deference is inapposite, however, because in those cases the agency's regulation, rather than the statute itself, supplied the governing standard or rule of decision. See, e.g., *Martin v. OSHRC*, 499 U.S. N.D. 144, 148 (1991); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to agency interpretation "[b]ecause the salary-basis test is a creature of the Secretary's own regulations"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Here, by contrast, it is the statute, not the regulation, that supplies the rule of decision, and thus no special deference is due to an interpretive guidance that purports to redefine the statutory text.

The cases relied upon by petitioner are also inapposite for another reason: They each involved regulations promulgated pursuant to express statutory authority. *Auer*, 519 U.S. at 456; *Thomas Jefferson Univ.*, 512 U.S. at 506-08; *Martin*, 499 U.S. at 147-48. Here, by contrast, Congress plainly did *not* grant the EEOC express authority to define "disability" or "substantially limits." Congress granted the EEOC authority to issue substantive regulations "to carry out Title I" of the ADA, but the statutory definition of "disability" is *not contained within* Title I. See ADA § 3(2), 104 Stat. 329, codified at 42 U.S.C. § 12102(2); ADA tit. I, § 106, 104 Stat. 336, codified at 42 U.S.C. § 12116. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress" (*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)), and no such authority was delegated in this instance. See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465 n.12 (1989); see also *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

Indeed, Congress exercised great care in allocating substantive rulemaking authority over specified portions of the ADA to particular agencies. See, e.g., 42 U.S.C. §§ 12134(a), 12143(b), 12149(a), 12164, 12186(a)(1), 12186(a)(2)(A)(i), 12186(a)(2)(B)(ii), 12186(b), 12204; 47 U.S.C. § 225(d). Its refusal to delegate such authority over the definition of "disability" should be respected, particularly because the only alternative is to infer a congressional delegation of overlapping rulemaking authority to each of the multiple agencies authorized to implement various portions of the ADA, an approach that would render *Chevron* deference inappropriate in any event (see *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (opinion of Stevens, J.)) and could give rise to conflicting regulations.²⁰

²⁰ In *Bragdon*, after having already concluded that respondent was disabled under the ADA (118 S. Ct. at 2207), this Court commented in *dictum* that the Department of Justice's views regarding

Thus, the non-binding EEOC pronouncements relied upon by petitioner are not entitled to controlling weight. Even if there were some doubt about the plain meaning of prong one, therefore—which there is not, for all the reasons discussed above—“the level of deference afforded [to the EEOC’s guidance] w[ould] depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Arabian American Oil Co.*, 499 U.S. at 257. “The EEOC’s interpretation does not fare well under these standards.” *Id.*

Far from reflecting thorough consideration, the portion of the interpretive guidance relied upon by petitioner fails to acknowledge, much less address, the glaring inconsistency between the text of prong one and the conclusion expressed in the guidance. The guidance instead purports to base its conclusion regarding “mitigating measures” solely on the ADA’s legislative history, but it wholly ignores substantial countervailing evidence in the various Committee Reports and in the pre-ADA construction of the Rehabilitation Act. *See* pp. 25-33, *supra*. And the guidance is internally inconsistent in several respects. For example, after stating that medicines and other measures to control impairments must be disregarded, the guidance posits the example of an indi-

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Title III of the ADA “are entitled to deference.” *Id.* at 2209 (citing *Chevron*). The Court’s *dictum* did not specifically discuss the degrees of deference due to the various types of agency materials regarding the ADA, and did not discuss the facts that no agency possesses substantive rulemaking authority with respect to the definition of disability and that any implied ability to issue interpretive rules is shared among multiple agencies. *Cf. id.* at 2207 (declining to resolve degree of deference due to multiple agencies under Rehabilitation Act). Accordingly, this *dictum* cannot be read to compel *Chevron* deference with respect to the agency materials at issue here.

vidual who “has *controlled* high blood pressure *that is not substantially limiting*.” 29 C.F.R. Pt. 1630 App. § 1630.2(l) (emphasis added). Moreover, the guidance states that prong one measures the “impact [on] *an individual’s life*” and the “effect of that impairment *on the life of the individual*” (*id.*, § 1630.2(j))—a mode of analysis that is irreconcilable with an approach that ignores the impairment’s true “effect . . . on the life of the individual” in favor of a hypothetical inquiry.

In addition, the EEOC’s interpretive guidance is contradicted by the agency’s purportedly binding regulation on the same subject. The regulation defines “substantially limits” to mean “[s]ignificantly restricted as to the condition, manner or duration under which an individual *can perform* a particular major life activity.” 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). By focusing exclusively on the extent to which an impaired individual “can perform” major life activities, the regulation necessarily requires a functional analysis and precludes a hypothetical inquiry conducted without reference to the individual’s actual abilities.

The EEOC’s guidance also conflicts with earlier and later pronouncements of the agency. As noted above (at p. 28), the EEOC has construed the Rehabilitation Act to require consideration of ameliorative measures in determining whether an individual is “substantially limit[ed],” yet the ADA guidance takes the opposite approach—without offering any explanation for the change. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (inconsistent agency positions receive “considerably less deference”) (citations and internal punctuation omitted). And EEOC publications issued since announcement of the guidance also contain a variety of conflicting statements.²¹

²¹ *See, e.g.*, EEOC, A Technical Assistance Manual on Title I of the ADA, § 2.2(c)(1) (1992) (“The individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: An employee has con-

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Moreover, the EEOC apparently disagrees with the Solicitor General on at least one aspect of this issue. As noted above, the Solicitor General seems to argue that the disability determination should be conducted without regard to "the extent to which [ameliorative] medications or devices impose new limitations" on impaired individuals. U.S. Br. 15. The Solicitor General's position in this regard is perhaps understandable, because it at least has the advantage of consistency; the alternative would be to adopt an incoherent, unprincipled, and result-oriented reading of prong one, under which the relevance of ameliorative measures (or of various aspects thereof) depends on which litigant would be advantaged by their consideration. As it happens, however, the position that the Solicitor General appears to be advancing in this Court is squarely at odds with the position taken by the EEOC.

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trolled high blood pressure which does not substantially limit his work activities.") (emphasis added and deleted); 2 EEOC, Compliance Manual § 902.4(c) (1995) (to satisfy prong one, "[t]he individual's *ability to perform* the major life activity must be restricted") (emphasis added); *id.* ("Not every impairment *affects an individual's life* to the extent that it is a substantially limiting impairment.") (emphasis added); *id.* § 902.4(c)(1) ("This analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting *for that individual*.") (emphasis added); *id.* § 902.4(d) ("The length of time that an impairment *affects* major life activities may help to determine whether the impairment substantially limits those activities.") (emphasis added). Interestingly, the Department of Education also appears to have concluded that ameliorative measures must be considered in making the "disability" determination. See 61 Fed. Reg. 28436, 28440 (1996) (finding that 4.3 million Americans are "unable to see to read ordinary newspaper print *even when wearing glasses*" but that only 1.3 million Americans suffer from "a visual impairment that substantially limits one or more major life activity").

The EEOC has repeatedly opined that ameliorative measures taken by an individual to control his or her impairment *must* be considered as part of the disability determination—but only to the extent they assist the impaired individual in proving disability. Thus, the EEOC takes the position that "[i]f medications cause negative side effects, these side effects *should be considered* in assessing whether the individual is substantially limited" (EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities, 2 Empl. Prac. Guide (CCH) ¶ 5430 at 6147 n.24 (Mar. 25, 1997) (emphasis added))—without offering any attempt to harmonize that conclusion with the diametrically opposed statement that "[w]hether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication." *Id.* at 6148. Similarly, the EEOC has stated that "an impairment that requires radiation therapy, which results in an abnormal rate or degree of exhaustion," renders the impaired individual disabled. EEOC Compliance Manual, § 902.4(c)(3), Ex. 3. See also *Mount v. Widnall*, No. WL 01923213, 1994 WL 739760 *2 (EEOC May 26, 1994) (individual was disabled because his "[impairment] *and his continual medication* caused some psychomotor slowing").

For all these reasons, the EEOC's position as reflected in the interpretive guidance and related materials lacks even the "power to persuade," and thus is entitled to no weight. See, e.g., *Sutton*, 130 F.3d at 901-02; *Gilday v. Mecosta County*, 124 F.3d 760, 766-67, 768 (6th Cir. 1997) (concurring and dissenting opinions of Kennedy, J., and Guy, J.).²² Indeed, even if the guidance were entitled to *Chevron* deference—which it plainly is not—it would not be controlling here, because the EEOC's interpretation is simply not "reasonable." *NCUA v. First National Bank & Trust Co.*, 118 S. Ct. 927, 938 (1998). And of course, there is no need to consider the EEOC's reading of the ADA at all, because the statutory

²² For the same reasons, the Department of Justice's interpretive guidances on this issue are equally lacking in persuasive value.

definition yields only one answer to the question presented in this case.²³

II. PETITIONER WAS NOT "REGARDED AS" DISABLED

The third prong of the definition of disability provides that an individual is disabled if he or she is "regarded as" having an impairment that substantially limits one or more major life activities, even though the individual does not in fact suffer from such an impairment. 42 U.S.C. § 12102(2)(C). Petitioner contends that he is disabled under prong three, because UPS allegedly "regarded" him as substantially limited in the major life activity of working. Pet. Br. 35-38.

²³ Petitioner argues in the alternative (Pet. Br. 30-32) that he is disabled even when his condition is evaluated in its real-world state. That issue is not properly before this Court, and should not be considered. The first question presented in the petition asks only "[w]hether the ADA . . . requires that Mr. Murphy's hypertension be evaluated in its unmedicated state" (Pet. i; see also Pet. 7); that question does not fairly encompass an inquiry into whether the court of appeals erred in its evaluation of petitioner's *medicated* impairment. SUP. CT. R. 14.1(a). In any event, both courts below examined the record evidence and concluded that there was no genuine issue of material fact on this issue. Pet. App. 4a, 29a-32a. That fact-bound determination is plainly correct: Petitioner has worked as a mechanic for 22 years without experiencing any significant limitations; his hypertension has no effect on his daily activities in that he "functions normally, doing everyday activity that an everyday person does"; and his only hypertension-related physical restriction is that he should not repetitively lift 200 pounds or more. Pet. App. 4a, 13a; J.A. 52a, 63a, 66a, 108a. The possibility that petitioner *might* suffer unpleasant side effects *if* he attempted to lower his blood pressure below 160/90 (Pet. Br. 31) is simply beside the point.

A. Petitioner Was Not "Regarded As" Substantially Limited In The Major Life Activity Of Working

Petitioner claims (Pet. Br. 35) that he was "regarded as" disabled because UPS considered him "unfit to work precisely because of his high blood pressure." Petitioner's argument in this regard mischaracterizes the record and finds no support in the law.

The record evidence clearly shows that UPS discharged petitioner solely because his blood pressure exceeded DOT limits. Both the district court and the court of appeals so held (Pet. App. 5a, 32a), and the record evidence amply confirms that holding. J.A. 85a-88a, 103a-105a. Indeed, the UPS employee who made the decision to terminate petitioner's employment testified without contradiction that petitioner was fired because he "did not meet the requirements of the Department of Transportation." J.A. 103a.²⁴ Thus, there is no evidence that UPS viewed petitioner as "unfit to work" in general. Rather, the evidence shows only that UPS regarded petitioner as unqualified to work *as a UPS mechanic* because he did not have a valid DOT health card. J.A. 105a, 120a.

An employer's mere recognition that an employee is *impaired*—such as by having high blood pressure—is insufficient to support a finding that the employee is "regarded as" disabled, even if the impairment renders the employee unable to qualify for the particular job in question. Prong three encompasses only those individuals who are "regarded as hav-

²⁴ Petitioner points to testimony to the effect that he was discharged because of his high blood pressure (Pet. Br. 35 n.16), but he does not contend that UPS discharged him for any reason other than the fact that his blood pressure exceeded DOT standards. Indeed, petitioner himself admitted that his blood pressure exceeded DOT requirements (J.A. 48a-49a; C.A. App. 108); for that very reason, he initially sought a waiver of those requirements (J.A. 49a, 54a; C.A. App. 109).

ing *such* an impairment," *i.e.*, an impairment "that substantially limits" a major life activity. 42 U.S.C. § 12102(2)(A) & (C) (emphasis added). In order to satisfy prong three, therefore, petitioner was required to prove that UPS "regarded" him as substantially limited in a major life activity. *See, e.g., Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 912-13 (11th Cir. 1996) (citing cases), *cert. denied*, 118 S. Ct. 630 (1997).

Contrary to petitioner's *ipse dixit* (Pet. Br. 35 & n.17), the inability to obtain a DOT health card does not constitute a substantial limitation on petitioner's major life activity of working. "Other than his position at UPS, [petitioner] has never been required to obtain DOT certification for any other job." Pet. App. 16a. He has "performed mechanic jobs that did not require DOT certification" for "over 22 years," and he secured another job as a mechanic shortly after leaving UPS. *Id.* at 13a, 17a. Plainly, petitioner has suffered no substantial limitations in working, and UPS perceived none.

The expert testimony in the record confirms that petitioner's failure to qualify for a valid DOT health card does not "substantially limit[]" his ability to work. UPS's vocational expert concluded that petitioner's hypertension does not generally "limit his ability to work or obtain jobs in the open labor market." J.A. 112a. Petitioner did not refute this evidence or prove that UPS had a different perception. The record is clear that UPS did not regard petitioner as substantially limited in the major life activity of working; rather, UPS regarded him only as incapable of working as a UPS mechanic because he lacked a valid DOT health card.

Cases construing the "regarded as" provision of the Rehabilitation Act prior to adoption of the ADA compel rejection of petitioner's "regarded as" claim. Those cases uniformly hold that an individual's inability to satisfy a prerequisite for a particular job is not a "substantial" limitation. *See, e.g., Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) ("regarded as" prong not satisfied by proof that employer viewed employee as "incapable of satisfying the singular demands of a particular job") (quoting *Forrisi v. Bowen*, 794

F.2d 931, 934 (4th Cir. 1986)). As the court explained in *de la Torres v. Bolger*, 610 F. Supp. 593, 596-97 (N.D. Tex. 1985), *aff'd on other grounds*, 781 F.2d 1134 (5th Cir. 1986) "[a]n impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not 'substantially limit[ing]' for purposes of the Rehabilitation Act." *Accord, e.g., Forrisi*, 794 F.2d at 935 (test is whether the employer finds "the employee's impairment to foreclose generally the type of employment involved"); *Miller v. AT&T Network Sys.*, 722 F. Supp. 633, 639 (D. Or. 1989) ("the impairment must substantially limit an individual's employability generally, and not just with respect to one particular job"), *aff'd and adopted*, 915 F.2d 1404 (9th Cir. 1990).²⁵

Thus, the pre-ADA Rehabilitation Act cases make clear that an employer's blanket exclusion of an impaired individual from a specific job is insufficient to render the individual disabled under the "regarded as" prong. In *Daley v. Koch*, for example, the Second Circuit held that "[b]eing declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity." 892 F.2d at 215. *Accord, e.g., McLeod v. City of Detroit*, 1985 U.S. Dist. LEXIS 16613 at *9 (E.D. Mich. 1985) (rejecting notion that "being a firefighter [i]s a major life activity"). *A fortiori*, there is no possible basis for finding that petitioner was "regarded as" disabled, because UPS did not even regard him as incapable of working as a mechanic; instead, UPS merely regarded him as lacking a valid DOT health card and therefore barred from working as a mechanic for UPS.

²⁵ The case law under the ADA is the same. *See, e.g., Patterson v. Chicago Ass'n For Retarded Citizens*, 150 F.3d 719, 725 (7th Cir. 1998) (the "impairment must substantially limit employment generally"); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir. 1997) (the impairment must "foreclose generally the type of employment involved"); *Gordon*, 100 F.3d at 913.

Petitioner points to the EEOC's regulation addressing the "regarded as" prong, which provides:

The term *substantially limits* means significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). Petitioner claims (without explanation or analysis) that his inability to obtain a DOT health card "implicates" either a class or a broad range of jobs. Pet. Br. 35 n.17.

The EEOC's regulation is of no assistance to petitioner. The regulation defines "class of jobs" to mean all "jobs utilizing similar training, knowledge, skills or abilities" as the job at issue within the geographic area to which the individual has reasonable access. 29 C.F.R. § 1630.2(j)(3)(ii)(B). Petitioner points to no evidence that UPS regarded him as precluded from working in all (or even most) such jobs in his geographic area, and his 22-year work history is directly inconsistent with any such assertion.²⁶

²⁶ Petitioner correctly notes (Pet. Br. 35 n.17) that a DOT health card is required for all employees driving "commercial motor vehicles" in "interstate commerce." 49 C.F.R. § 390.3(a). That fact does not demonstrate that petitioner was, or was regarded as, excluded from a "class of jobs," however. There is no evidence that the ability to drive commercial vehicles in interstate commerce is a prerequisite for all or most jobs requiring "training, knowledge, skills or abilities" similar to those required for a UPS mechanic's job. In fact, the record evidence is squarely to the contrary, as petitioner's ease in obtaining employment amply demonstrates. Indeed, even if petitioner were a truck driver, rather than a mechanic, his inability to obtain a DOT health card would not exclude him from a "class of jobs"; the DOT's requirements generally extend only to large vehicles (those weighing over 10,000 pounds) and do

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The regulation defines a "broad range of jobs in various classes" as "other jobs not utilizing similar training, knowledge, skills or abilities." 29 C.F.R. § 1630.2(j)(3)(ii)(C). Once again, petitioner points to nothing in the record demonstrating that he was regarded as incapable of performing a "broad range of jobs," and UPS's expert concluded without contradiction that he is in fact capable of performing *thousands* of jobs. J.A. 114a.

Federal courts applying the EEOC's regulations have uniformly rejected claims like those advanced by petitioner. In *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998), for example, the court rejected an ADA claim brought by a terminated pilot, holding that "piloting airplanes is too narrow a range of jobs to constitute a 'class of jobs.'" *Id.* at 1370. Similarly, in *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997), the Fifth Circuit concluded that "[a] limitation that prevents one from becoming a firefighter—or even a firefighter and associated municipal paramedic or EMT backup firefighter . . . only affects a 'narrow range of jobs'" and implicates "too narrow a field to describe [as] a 'class of jobs.'" *Id.* at 334, 336.²⁷

Against this backdrop, petitioner's "regarded as" claim is patently meritless. Petitioner could no doubt have obtained any number of mechanic and other jobs in his region, and there is no indication that UPS perceived him as unable to do so. Nor is there any evidence that respondent was "regarded as" unable to perform other driving-related jobs not requiring

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not cover trucks or large other vehicles traveling in intrastate commerce. 49 C.F.R. § 390.5. *A fortiori*, then, a mechanic like petitioner is not (and is not perceived as) substantially limited in working merely because he cannot obtain a DOT health card.

²⁷ *Accord, e.g., Patterson*, 150 F.3d at 725; *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *McKay*, 110 F.3d at 373; *Welsh*, 977 F.2d at 1416-20.

compliance with DOT standards. Petitioner's "regarded as" claim must fail.

B. The Court Of Appeals Correctly Held That Petitioner Failed To Satisfy DOT Requirements

Petitioner contends (Pet. 36-37) that the court of appeals erred in holding that he failed to satisfy DOT requirements.²⁸ Even if that contention were correct, it would be irrelevant, because the record is clear that UPS did not regard petitioner as substantially limited in his ability to work. In any event, petitioner's contention is incorrect.

The DOT's regulations provide that an individual cannot drive a "commercial motor vehicle" if he or she has "high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. § 391.41(b)(6). The DOT has provided further guidance on this issue in its Medical Regulatory Criteria for Evaluation Under Section 391.41(b)(6), which states that where an indi-

²⁸ Petitioner waived this issue in the district court, where he admitted that under the DOT medical criteria "in order to be physically qualified to drive a commercial motor vehicle, other than a temporary three-month certification, . . . an individual must maintain blood pressure less than or equal to 160/90." J.A. 127a-128a ¶ 30; J.A. 136a. Nor is this issue fairly encompassed within the grant of certiorari. Petitioner's fourth question asks "[w]hether there was no genuine dispute whether UPS regarded [petitioner] as disabled and fired him because of his hypertension?" Pet. i. The petition's one-paragraph discussion of that question (Pet. 7-8) contains no suggestion that it encompasses a challenge to the correctness of the court of appeals' determination that petitioner's "blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." Pet. App. 5a. Indeed, the only sentence in the petition that even arguably relates to such an assertion is contained in the discussion of the second question presented—a question on which the Court did not grant certiorari. See Pet. 7.

vidual's "[i]nitial blood pressure [is] greater than 180 systolic and/or greater than 104 diastolic," "[t]he driver may not be qualified, even temporarily, until his or her blood pressure has been reduced to less than 181/105." J.A. 99a (emphasis in original); see C.A. App. 85 (same); EEOC C.A. Br. 4 (conceding that "[i]f the person's blood pressure is greater than 180/104, . . . the person is not to be certified as qualified, even temporarily, until his blood pressure has been reduced to less than 181/105").

Petitioner's initial blood pressure reading was 186/124, well in excess of the upper limit established by the DOT criteria. Pet. App. 16a. Although he was issued a DOT health card at that time, it is clear that the health card was invalid and was issued in error, based on the examining nurse's incorrect assumption that petitioner, as a mechanic, would not be driving commercial vehicles. *Id.*; J.A. 74a-75a, 84a, 93a, 106a-107a.

Petitioner notes (Pet. Br. 37) that his blood pressure was lower than 181/105 when it was retested in September 1994, and both he and the Solicitor General argue that the DOT's regulations grant medical examiners discretion to grant temporary three-month certificates in those circumstances. But there is no evidence that the individual who performed the second examination in fact decided to exercise this alleged discretion to issue a temporary health card. To the contrary, the only evidence on that issue is the testimony of UPS's medical expert, who concluded that petitioner was not qualified for discretionary issuance of a temporary health card. J.A. 109a-111a.

Thus, petitioner never received a valid DOT health card and failed to satisfy DOT requirements for drivers of commercial vehicles. DOT regulations permit individual employees or applicants to seek administrative relief in such circumstances (49 C.F.R. § 391.47), but petitioner ultimately chose not to pursue such relief. J.A. 49a-50a, 54a. His failure to exhaust administrative remedies precludes judicial review of this issue.

The Solicitor General argues at length (U.S. Br. 25-29) that it was error for the court of appeals to give any weight to petitioner's failure to satisfy DOT guidelines. That argument misses the point. In the court of appeals, both petitioner and the EEOC argued that petitioner was "regarded as" disabled because UPS purportedly "made an employment decision because of a perception of disability based on 'myth, fear or stereotype.'" EEOC C.A. Br. 15; *see* Pet. App. 4a-5a. In noting that UPS's employment action was instead based on petitioner's failure to satisfy DOT requirements, the court of appeals was simply responding to the arguments advanced by petitioner and the EEOC.

In any event, while an applicant's failure to meet arbitrary employer-established job qualifications would not preclude a showing that the employer "regarded" the applicant as disabled, it hardly follows that the legitimacy of an employer's reasons for an employment action are irrelevant to the "regarded as" inquiry. This Court held in *Arline* that the "regarded as" prong was intended to protect against "discrimination on the basis of mythology." 480 U.S. at 284. UPS's reasonable reliance on DOT guidelines confirms that petitioner was not "regarded as" disabled, because UPS acted on the basis of "reasoned and medically sound judgments" rather than engaging in "reflexive reactions" to a "perceived" disability. *Id.* at 284-85.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

* * * * *

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

* * * * *

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

* * * * *

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

* * * * *

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * * *

SUBCHAPTER I—EMPLOYMENT

* * * * *

§ 12111. Definitions

As used in this subchapter:

* * * * *

(9) Reasonable Accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * * * *

§ 12112. Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

* * * * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such governed entity;

* * * * *

(d) Medical examinations and inquiries

* * * *

(3) Employment entrance examination

* * * *

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

* * * *

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;

* * * *

SUBCHAPTER II—PUBLIC SERVICES**PART A—PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS**

* * * *

§ 12132. Discriminations

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

* * * *

§ 12134. Regulations**(a) In general**

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary

of Transportation under section 12143, 12149, or 12164 of this title.

* * * *

PART B—ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY**SUBPART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS**

* * * *

§ 12142. Public entities operating fixed route systems

* * * *

(c) Remanufactured vehicles

* * * *

(2) Exception for historic vehicles**(A) General rule**

If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

* * * *

§ 12143. **Paratransit as a complement to fixed route service**

* * * * *

(b) **Issuance of regulations**

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

* * * * *

§ 12147. **Alterations of existing facilities**

(a) **General rule**

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination * * * for a public entity to fail to make such alterations * * * in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities * * *.

* * * * *

§ 12149. **Regulations**

(a) **In general**

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

* * * * *

SUBPART II—PUBLIC TRANSPORTATION BY INTERCITY AND COMMUTER RAIL

* * * * *

§ 12164. **Regulations**

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

* * * * *

SUBCHAPTER III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

* * * * *

§ 12182. **Prohibition of discrimination by public accommodations**

(a) **General rule**

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) **Construction**

* * * * *

(2) **Specific prohibitions**

(A) **Discrimination**

For purposes of subsection (a) of this section, discrimination includes—

* * * * *

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation

barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

* * * * *

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

* * * * *

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. * * *

* * * * *

§ 12184. Prohibition of discrimination in specified public transportation services provided by private entities.

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

* * * * *

(c) Historical or antiquated cars

(1) Exception

To the extent that compliance with subsection (b)(2)(C) or (b)(7) of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, * * * such compliance shall not be required.

* * * * *

§ 12186. Regulations

(a) Transportation provisions

(1) General rule

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

(2) Special rules for providing access to over-the-road buses

(A) Interim requirements

(i) Issuance

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regula-

tions in an accessible format to carry out sections 12184(b)(4) and 12812(b)(2)(D)(ii) of this title

* * * * *

(B) Final requirement

* * * * *

(ii) Issuance

Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title

* * * * *

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

* * * * *

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

* * * * *

§ 12204. Regulations by architectural and transportation barriers compliance board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and II of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

* * * * *

APR 8 1999

CLERK

No. 97-1992

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. The ADA's "Disability" Determination Should Be Made Without Consideration Of Mitigating Measures

Respondent United Parcel Service ("UPS") takes the position that many Americans should receive no protection under the ADA because, at least in theory, they might be able to ameliorate some of the effects of their impairments. On the other hand, many of those same people need not bother applying for employment with UPS, which would never consider hiring them. UPS's position is in direct conflict with the ADA's directive that employers focus on employees' *abilities*, not their *disabilities*.

UPS repeatedly asserts that the ADA only applies to the "truly disabled."¹ Perhaps UPS believes that Title I only applies to people who use wheelchairs. But that was not Congress's view when it enacted Title I, and nothing in the language and structure of Title I of the ADA so limits the statute. This Court should reject UPS's invitation to interpret the ADA to perpetuate rather than eliminate traditional stereotypes about the disabled.

A. The ADA's Language And Structure Demonstrate That The "Disability" Definition Is Inclusive

1. *The Plain Meaning.* As explained and anticipated in petitioner's opening brief, UPS's exclusive reliance on the statute's present tense usage of the word "limits" is misplaced. Not surprisingly, UPS cites *no* cases in which this Court has found the present tense usage of a verb to be dispositive in determining a statute's meaning.²

1. Even were UPS correct that Title I protects only the "truly disabled," a phrase the ADA never uses, Vaughn Murphy would qualify for protection. A study published in 1995 indicates that, although approximately 24% of adult Americans have some level of hypertension, Vicki L. Burt, *et al.*, *Prevalence of Hypertension in the US Adult Population: Results From the Third National Health and Nutrition Examination Survey, 1988-1991*, 25 *Hypertension* 305, 307 (1995), less than 1% have hypertension in the Stage III or IV ranges. *Id.* at 310 (Table 4). Murphy's extraordinary hypertension, 250/160 untreated, is Stage IV.

2. The only case UPS purports to rely upon, *United States v. Wilson*, 503 U.S. 329 (1992), involved a statutory provision that used the past and present perfect tenses, in conjunction with the passive voice, all of which, as the Court

(Cont'd)

The present tense is a preferred and common usage in stating general truths or describing repeated situations. *See, e.g.,* H. Ramsey Fowler, *The Little, Brown Handbook* 156 (1980); *see also* William Strunk, Jr., & E.B. White, *The Elements of Style* 31 (3d ed. 1979) (in summarizing action, “use the present” tense). Present tense usage is both good grammar and good style. Moreover, present tense usage is prevalent throughout the ADA, as well as the entire United States Code. Thus, it is no surprise and of no special significance that Congress phrased the statutory “disability” definition in the present tense. Rather, it is more logical to conclude that only deviations from present tense usage are likely to be significant for purposes of statutory interpretation. *Cf. United States v. Wilson*, 503 U.S. 329, 333-34 (1992) (relying in part upon statute’s use of present perfect tense to ascertain meaning).

UPS’s assertion that Murphy and his *amici* are seeking to rewrite the statute in the subjunctive mood to require courts and employers to engage in speculative and hypothetical inquiries is unfounded. Congress phrased the definition in the most natural way in the English language, a way that is both grammatically and stylistically appropriate. Moreover, as further discussed in Part I.C. below, Congress expressly intended that the statutory language be read to exclude consideration of mitigating measures, as the relevant committee reports establish. Congress at a minimum viewed the statutory language “impairment that substantially limits” as capable of meaning “unmitigated impairment that substantially limits”, even if other readings may also be plausible. Thus, the interpretation that the Equal Employment Opportunity Commission (“EEOC”) and a majority of the Courts of Appeal have adopted is faithful to the statutory language, principles of English grammar and style, and Congress’s expressed intent.

(Cont’d)
acknowledged, made that particular provision somewhat confusing. Even so, this Court in *Wilson* adhered to its holistic approach to statutory construction, considering not only the verb tense, but also another sentence in the statute that supported the Court’s interpretation, *id.* at 334, whether one interpretation would produce an absurd result, *id.*, and reasons why Congress might have intended one reading or another. *Id.*

Furthermore, there is nothing hypothetical about the inquiry required if mitigating measures are ignored. Murphy’s Stage IV hypertension is permanent. Persistent hypertension is a result of increased cardiac output and/or a rise in peripheral, vascular resistance. Braunwald, *Heart Disease: A Textbook of Cardiovascular Medicine*, at 816 (5th ed. 1997). Blood pressure itself is not an impairment, but a clinical and diagnostic marker for underlying pathology in the cardiovascular system. *See, e.g.,* J.A. 65a-66a. Strictly speaking, it is this underlying pathology that is Murphy’s “impairment,” but it is the effect of that pathology—severe hypertension that damages his cardiovascular system and end organs—that “substantially limits” his major life activities.

Murphy’s hypertension may fluctuate depending on the effectiveness of his medication and the side effects particular dosages produce, but Murphy is never “cured,” nor is his physiological impairment ever “under control,” even if medication limits some of its effects. Thus, Murphy is in the class of individuals “with *characteristics* that are beyond the control of such individuals.” 42 U.S.C. § 12101(7) (emphasis added). UPS’s effort to limit the ADA’s reach on the basis of this congressional finding is unavailing, both in this case and in general. Murphy’s “characteristic” is beyond his control. Moreover, and in any event, Congress did not limit the ADA’s protections to those individuals whose impairments are beyond their control.³

There is nothing hypothetical about concluding that Murphy’s underlying impairment, which he cannot cure nor eliminate,

3. UPS’s assertion that “in petitioner’s view” even people whose impairments have been permanently altered by “subconscious internal adjustments, surgery, or the like will continue to enjoy” protection under the first prong of the “disability” definition, Resp. Br. 12, is thus inaccurate. UPS ignores that there must be an “impairment” before the first prong of the ADA definition can possibly apply, but that the same is not true of the second and third prongs. If, for example, surgery permanently eliminates an individual’s medical condition, then that individual may not have an “impairment” at all. If so, the first prong would no longer protect that individual. The second and third prongs (“record of” impairment, or “regarded as” having such an impairment), however, might still cover the individual.

substantially "limits" him in many major life activities, such as exercising, running, caring for himself and working. Indeed, the hypothetical inquiries are whether Murphy's lifelong regimen of medication will continue to be effective and what side effects it will cause. As the record in this case demonstrates, Murphy's blood pressure fluctuates significantly even while he is on medication. There is no way to objectively and precisely determine his level of hypertension in his medicated state. His underlying impairment, on the other hand, is permanent, and its unmedicated effects are capable of objective evaluation.

Justice Souter has declared for a unanimous Court that

Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.

United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., 508 U.S. 439, 455 (1993) (other internal citations omitted).

Under the EEOC interpretation, endorsed by a majority of the Courts of Appeals, each aspect of the statutory definition has operative effect. Thus, Murphy must prove that (1) he has an impairment that (2) without mitigation substantially limits (3) one or more of his major life activities. *Cf. Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-07 (1998); *id.* at 2214 (Rehnquist, C.J., concurring in part, dissenting in part). Murphy is not arguing that high blood pressure is a *per se* or inherent disability, although at extreme levels some impairments, including hypertension, will almost necessarily be disabling. The ADA requires an evaluation of the impairment's effect on the individual, but that proposition alone does not answer the mitigating measures question.

2. *Statutory Structure and Context.* Holistic statutory interpretation requires that the terms of a statute be read in the context of the "surrounding body of law into which the provision must be integrated." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). UPS, however, never really addresses the ADA's overall structure and context. UPS never explains how its interpretation of the ADA "disability" definition gives any separate effect or purpose to the statute's other inquiries, such as determining (1) the essential functions of the job at issue, (2) whether a plaintiff is a "qualified individual", (3) whether reasonable accommodations are possible, and (4) whether the person would present a safety risk to others.

UPS's primary "structural" argument appears to be that, through the "record of" and "regarded as" prongs of the statutory "disability" definition, Congress extended "coverage to certain individuals whose impairments are not in fact substantially limiting", allegedly demonstrating that "Congress knew how to protect individuals who are not in reality substantially limited." Resp. Br. 14. But UPS's argument is flawed, both in its premise and its logic. Nothing in the "record of" or "regarded as" prongs requires that the covered person even have an "impairment", much less any sort of resulting limitations. It would be absurd to read the ADA to offer *no* protection to Murphy, because medication can mitigate some of the effects of his severe hypertension, while protecting a plaintiff who does not even have an actual *impairment*, much less a *substantially limiting* one. To use a favorite UPS phrase, it is difficult to see how the latter person is "truly disabled." Rather, Congress's inclusion of the "record of" and "regarded as" alternatives in the statute are confirmation of the *breadth* of the entire threshold "disability" definition, not the narrowness of the first prong. *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) (Posner, C.J.) ("Disability is broadly defined.")⁴

4. There is no plausible claim that interpreting the ADA to ignore mitigating measures in making the disability determination will raise constitutional problems in applying the statute to Murphy. *See* Resp. Br. 12 n.6. Prohibiting UPS's discrimination against prospective or actual employees such as Murphy does not exceed Congress's power to regulate

(Cont'd)

3. *Absurdity.* UPS's proposed interpretation of the statute will lead to absurd results. For example, under UPS's interpretation, no protection will be afforded to an employee whose medication is effective and causing no significant side effects at the time the employer takes action adverse to that individual.⁵ But the same employee might then become protected by the ADA if, for example, the adverse employment action causes the employee to lose health insurance that pays for the medication—because then the effects of the employee's impairment would not be ameliorated.

Thus, under UPS's approach, the same person could at one moment in time be fired by the employer without fear of ADA liability, but at a later time be protected by the ADA, or a subsequent potential employer might violate the ADA if it refused to hire the (now unmedicated) employee. As Justice Ginsburg observed in *Bragdon v. Abbott*, “[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination where the

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interstate commerce, no matter how broadly the class of persons having a “disability” is defined. See 42 U.S.C. § 12101(b) (stating that Congress relied, *inter alia*, upon its commerce power in enacting the ADA). Whether there might be any plausible constitutional objection to applying the ADA to the States is, of course, a different matter under the Eleventh Amendment, but UPS as a private employer has no standing to raise such an objection which would not assist UPS. In any event, UPS has waived any constitutional argument here. It did not raise the argument in the courts below, and neither lower court opinion mentions, much less addresses, the argument. See, e.g., *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (refusing to address constitutional challenge to ADA when issue was neither raised nor addressed in the lower courts).

5. The notion that conditions such as Murphy's hypertension are “controlled,” something that both UPS and its *amici* assert, see, e.g., Resp. Br. 1, is simply untrue in this case and frequently untrue as a matter of medical fact. More likely is that the effects of such conditions may be ameliorated or limited, but there is no *cure* for Murphy's hypertension, and his high blood pressure fluctuates significantly even when medicated. Even with medication, Murphy is not close to having “normal” blood pressure. Moreover, the nurse that performed Murphy's DOT examination testified that, in his view, Murphy's blood pressure is not under control, J.A. 75a, and no medical person, including UPS's designated medical expert, testified that Murphy's hypertension is in fact “under control.”

disease, though present, is not yet visible.” 118 S. Ct. at 2214 (Ginsburg, J., concurring). The absurdity of UPS's interpretation is that an individual with an incurable impairment, such as Murphy's severe hypertension manifests, may at times be protected by the ADA and at other times not, even though the individual's underlying impairment has not changed, and probably never will.

UPS also argues that “petitioner's interpretation would require courts and agencies to ignore the adverse effects of medication or other ameliorative measures.” Resp. Br. 15 But it is precisely because of the side effects of mitigating measures such as medication that the courts should not consider the ameliorative results of those measures in making the disability determination. The nature and severity of side effects often may fluctuate over time or with varying types or dosages of medication, as is true in Murphy's case. Thus, consideration of such measures is an inherently unstable basis for making the disability determination. The underlying impairment, however, remains constant and is a more objective way to measure the individual's limitations. Moreover, if the side effects of the medication are more severe or disabling than the impairment itself, presumably no rational individual would undertake the mitigating measure.

Nor is any unreasonable or extraordinary burden placed on employers by adopting a rule excluding consideration of mitigating measures. If, indeed, as UPS suggests, “to the employer, individuals whose impairments are controlled may not appear to be impaired in any way,” Resp. Br. 16, then employers have nothing to fear in terms of ADA liability. If an employer has no knowledge that an employee is or might be considered disabled, it seems impossible that the employer could ever be proven to have discriminated on the basis of a “disability.”⁶ What UPS's argument completely ignores in this

6. Moreover, as UPS well knows, the kinds of pre-employment inquiries that it asserts will be necessary in fact are generally prohibited by the ADA, which states that “a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.” 42 U.S.C. § 12112(d)(2)(A). Rather, the ADA instructs employers to focus on the person's *ability* to do the job, not an individual's

(Cont'd)

context, is that the "disability" inquiry is only a preliminary, threshold determination. It is not the sole and final determinant of ADA liability.

In contrast to UPS's proposed interpretation, a rule that ignores mitigating measures in making the disability determination is faithful to the statutory scheme and purposes. Such a rule permits individualized assessment of a person's impairment and its effects, and it results in a consistent and constant result that the person either is disabled under the ADA or is not, period. Only this interpretation can provide the "clear" and "consistent" standards Congress declared as a purpose of the ADA. *See* 42 U.S.C. § 12101(b)(2).

4. *ADA Policy.* UPS's argument that Murphy somehow seeks to use his hypertension to place himself in a "privileged class" of ADA-protected individuals is unfair to Murphy. *See* Resp. Br. 20. The evidence is undisputed that, absent medication, Murphy likely would be hospitalized because of his hypertension. J.A. 80a-81a. Murphy is not seeking something to which he is not entitled; he did not create his medical condition to gain an employment "advantage," and he has managed to work as a mechanic for some employers with very limited accommodations required. But UPS refused to consider *any* accommodations, minimal or not. Instead, UPS's categorical and unreflective assumption that Murphy cannot perform the job represents precisely the kind of "stereotypic assumptions not truly indicative of the individual ability of such individuals," 42 U.S.C. § 12101(7), that Congress intended to be scrutinized under the ADA. UPS's obsession with Murphy's hypertension, instead of his ability, thwarts rather than serves the policies of the ADA.

UPS offers the "example" of a person with hypertension who is "unable" to take medication, but has the same minimal limitations that UPS believes Murphy suffers *when taking medication*. Resp. Br. 19-20. UPS then declares that, although such a hypothetical person and Murphy are "equally limited," it is somehow contrary to the ADA's

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disability. *Id.* § 12112(d)(2)(B) ("A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions."). The employer may follow up a conditional job offer with a physical examination, but the point is that the ADA directs employers to focus on prospective employees' *abilities*, not *disabilities*.

policy that only Murphy is protected. *Id.* at 20. UPS's example confirms, rather than refutes, the logic and the wisdom of a rule that excludes consideration of mitigating measures. As the undisputed facts demonstrate, Murphy does not have the option of being "unable" to take blood pressure medication. He would be hospitalized and at high risk for serious medical complications without medication. J.A. 64a, 80a-81a. Thus, Murphy and UPS's hypothetical person are not "equal" at all, and it is by no means contrary to the ADA's purposes to protect Murphy from UPS's discrimination.

UPS also speculates that giving the ADA its full scope will actually harm the "truly disabled" because the ADA will be more costly to employers, making it more likely that employers will successfully plead "undue hardship." Resp. Br. 20. What this suggestion ignores is that individuals like Murphy often require no accommodation at all; they just want employment opportunities on equal footing.⁷ The ADA requires employers like UPS to focus on employees' *abilities*, not their *disabilities*.⁸ Moreover, the ADA already takes into account the concerns of employers by mandating inquiries into the essential functions, qualified individual, and reasonable accommodations issues, as well as recognizing potential defenses based on concerns about the safety of other workers. Congress, as our national legislature, considered all of the concerns UPS now raises,

7. There is no legitimate reason to permit disability discrimination against individuals whose self-initiated mitigating measures happen "to be exceptionally good." *Fallarcaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997). Rather, firing an employee when *no* accommodation by the employer will be necessary only makes the employer's conduct more pernicious. Yet, this is precisely the result that UPS's interpretation of the "disability" definition would condone.

8. Indeed, had UPS focused on Murphy's abilities, rather than on his actual or perceived disabilities, the uncontroverted medical evidence is that Murphy's hypertension does not interfere with his ability to safely operate a commercial motor vehicle. *See* J.A. 67a (Q: "Is Vaughn Murphy's hypertension likely to interfere with his ability to operate a commercial motor vehicle safely?" A: "No.") (testimony of treating physician, Debra Doubek, M.D.); *id.* at 70a ("In summary, his blood pressure readings are elevated but I feel he is healthy to drive a truck for test purposes") (Report of treating physician, Debra Doubek, M.D., provided to UPS before it fired Murphy).

and Congress struck the balance that it deemed appropriate between the interests of employers and the rights of the disabled. Congress's policy choices were not irrational, and there is no basis for overriding or rewriting them.

B. Rehabilitation Act Cases And Regulations Neither Adopt Nor Support A Rule That Mitigating Measures Be Considered

UPS's argument that the Rehabilitation Act cases and regulations compel interpreting the ADA's "disability" definition to require consideration of mitigating measures is meritless. As explained in footnote 8, at page 21, of Murphy's opening brief, neither the Rehabilitation Act cases nor the relevant agency regulations resolve the mitigating measures question.⁹

UPS itself concedes that "[t]he regulations issued under the Rehabilitation Act do not specifically discuss ameliorative measures." Resp. Br. 28. Nor did the pre-1990 cases adopt a general rule requiring consideration of mitigating measures. Contrary to UPS's assertions, there are many more Rehabilitation Act cases that appear to *assume* that mitigating measures are ignored, than that give any credence to the "rule" UPS asserts. The few cases UPS cites lack any persuasive value. Almost all are district court decisions, some unpublished, and none actually discuss the issue in any detail. The Ninth Circuit case UPS relies on, *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), is a case in which the choice of rule made no difference because the court recognized that the plaintiff was "handicapped" even if her medication was considered.

If anything, on balance, what guidance the Rehabilitation Act cases provide supports evaluating "handicaps" *without* consideration of mitigating measures. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 154 n.295 (1999) (citing and discussing Rehabilitation Act cases); see also Brief for the United States and Equal Employment Opportunity Commission as *Amicus Curiae* (U.S. Br.), at 12 n.5 (discussing Rehabilitation Act cases and regulations); Brief for AIDS Action, *et al.* As *Amicus Curiae*, at 3-6 (same).

9. One of UPS's *amici* concedes this point. See Brief of *Amicus Curiae* Society for Human Resources Management 13 n.9 ("the issue was never conclusively decided under the Rehabilitation Act").

C. The ADA's Legislative History Confirms That The "Disability" Determination Should Be Made Without Consideration Of Mitigating Measures

The legislative history clearly and repeatedly expresses Congress's intent and understanding that the statutory language excludes consideration of mitigating measures, whether those measures are employee-initiated (e.g., medication or prosthetic devices), or employer-sponsored ("auxiliary aids" or "reasonable accommodations"). The House Labor Committee Report, for example, provides as follows:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), at 52 (1990). Thus, Congress's references to "hearing aids" and "medication" are not, as UPS states, Resp. Br. 33, "stray passages." Rather, they are concrete examples of what Congress meant by the term "mitigating measures." The House Judiciary Committee Report makes precisely the same point, H.R. Rep. No. 101-485(III), at 28-29 (1990),¹⁰ and the Senate Report's inclusion of the same general

10. The two other House Reports simply do not address the mitigating measures question. The report of the House Committee on Public Works and Transportation does not discuss the "disability" definition at all, see H.R. Rep. No. 101-485(I) (1990), and the report of the Committee on Energy and Commerce contains only an abbreviated discussion that simply repeats the statutory language, notes the relationship to the Rehabilitation Act, and comments on the change in terminology from "handicapped" to "disabled." See H.R. Rep. No. 101-485(IV), at 36 (1990). Thus, these (Cont'd)

statement regarding mitigating measures, but without specific examples, is most naturally read to have the same meaning.¹¹

The House Committees' use of the word "mitigating" to refer generally to all measures that may ameliorate the effects of an impairment is entirely consistent with ordinary usage of the word. See, e.g., *Webster's Third New International Dictionary* 1447 (1986) (defining "mitigate" as "to make less severe, violent, cruel, intense, painful"). In contrast, UPS offers no basis for its conjecture that Congress understood the word "mitigating" to refer only to employer-sponsored measures, but not to employee-initiated measures, such as medication.¹² Thus, UPS's discussion of the ADA's legislative history is flawed. Legislative history is rarely so clear as it is on the mitigating

(Cont'd)

reports provide no support for UPS's suggestion that they demonstrate a congressional intent to require consideration of mitigation measures. Resp. Br. 33 n.18.

11. Thus, UPS's effort to cast some doubt on the Senate Report, because it refers only to "mitigating measures such as reasonable accommodations or auxiliary aids", Resp. Br. 32, is unavailing. Indeed, the Senate Report, by the use of the phrase "such as," refers to these mitigating measures only as non-exhaustive examples, and in part to emphasize that later inquiries in the statute are not to be imported into the threshold "disability" determination. Moreover, as the Fifth Circuit observed, "the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

12. The absence of any discussion of the mitigating measures issue in the final House Conference Report refutes rather than supports UPS's narrow interpretation. Indeed, the absence of such discussion demonstrates that both houses of Congress understood the statute not to require consideration of mitigating measures. Under Congress's rules, a conference committee generally can only resolve conflicts between the bills passed in the two chambers. See, e.g., Senate Rule XXVIII.2; House Rule XXII.9. Thus, the conference report's silence reflects prior agreement on the question. Because the relevant language was the same in both bills, and the House and Senate Committee reports were in explicit agreement that mitigating measures should be ignored, it would have been improper — as well as unnecessary — for the conference report to address the issue.

measures issue, and that history demonstrates that Congress read the statutory definition to require that mitigating measures be ignored.

In any event, even were the Committee Reports read to point in contrary directions, that situation would establish that reasonable legislators could disagree about what the statutory language requires. That in turn would establish, at a minimum, that the statutory language may plausibly be read in more than one way, and that deference should be given to the views of the federal agencies Congress charged with implementing the ADA.

D. The EEOC's Interpretation Is Entitled To Deference

UPS's argument that the EEOC's interpretive guidance is entitled to no deference at all hinges entirely on the erroneous proposition that there is only one plausible reading of the first prong of the "disability" definition. Because UPS's "plain meaning" argument fails, UPS's "no deference" argument necessarily also fails.

UPS acknowledges that, under *Chevron*, deference to agency regulations is appropriate unless the regulations are " 'contrary to clear congressional intent' after applying 'traditional tools of statutory construction.' " Resp. Br. 34 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984)). This Court recently reiterated that, when considering whether deference to an agency regulation is appropriate, "we first ask whether Congress has 'directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . .'" *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 499-500 (1998) (quoting *Chevron*, 467 U.S. at 842) (emphasis added); see also *Cedar Rapids Comm. Sch. Dist. v. Garrett*, 119 S. Ct. 992, 1000 (1999) (Thomas, J., dissenting) (same proposition).

The preceding quotation highlights that this Court's *Chevron* doctrine focuses on congressional intent, and this Court traditionally has ascertained such intent not just by reference to the language of the statutory provision at issue, but also the statute's purposes, structure, context and legislative history. All of these traditional tools of statutory construction are appropriate considerations in applying the *Chevron* doctrine.

The ADA's structure and purposes establish the correctness of an interpretation that ignores mitigating measures. Furthermore, the legislative history confirms that Congress "intended" such an interpretation.¹³ Thus, although deference to the EEOC's regulations and interpretive guidance is unnecessary in this case, the EEOC's interpretation is completely consistent with Congress's explicitly declared *intent*.

Furthermore, this Court's recent decisions have declined to draw any sharp distinction between an agency's regulations and an agency's interpretation of its own regulations. Indeed, the Court has given deference even to agency positions set forth in litigation documents. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 462 (1997) (unanimous Court deferring to agency interpretation set forth in an *amicus* brief). UPS's only argument to evade such recent decisions is that the statutory language in this case is susceptible of only one interpretation and, therefore, there is nothing for the EEOC to "interpret." *See* Resp. Br. 36.

UPS also argues that Congress did not delegate to the EEOC the authority to interpret the "disability" definition. Resp. Br. 37. This argument leads nowhere. Congress expressly delegated to the EEOC the authority to issue rules and regulations to implement the provisions of Title I (employment). *See* 42 U.S.C. § 12116. Because application of any of Title I's provisions hinges on the threshold "disability" determination, Congress's delegation necessarily included the authority to address the "disability" definition.

In UPS's view, *no* federal agency actually has any authority to issue rules or regulations regarding the "disability" definition, because that definition is contained in a preliminary section of the ADA over which Congress did not expressly delegate authority to any particular agency. UPS argues that a contrary conclusion would result in overlapping rulemaking authority for the multiple agencies involved in enforcing the ADA, Resp. Br. 37, but it is unclear both why Congress would lack the authority to make such a delegation or why

13. Even UPS concedes that there is legislative history directly contradicting UPS's restrictive reading of the statute. *See* Resp. Br. 33 (acknowledging contrary statements).

it makes any difference in this case. As UPS knows, the federal agencies charged with implementing the various titles of the ADA have *uniformly* adopted the rule that mitigating measures are not to be considered. *See, e.g., Bragdon v. Abbott*, 118 S. Ct. at 2206 (pointing out Justice Department interpretation that is identical to EEOC view). Thus, even if UPS's concerns had a foundation in general, there is no conflict in this case.

UPS also asserts that the EEOC's interpretive guidance is not entitled to deference because it "conflicts with earlier and later pronouncements of the agency." Resp. Br. 39. This argument, however, is premised on UPS's assertion that, in a *single, administrative Rehabilitation Act case* that came before the agency in 1990, prior to the ADA even being enacted, the EEOC allegedly asserted a position that UPS believes supported interpreting the Rehabilitation Act to require consideration of mitigating measures in making the "handicap" determination. *See* Resp. Br. 28. Even were that assertion accurate, it says nothing about the EEOC's interpretation of the ADA. Thus, UPS has no support for the assertion that the EEOC has changed its position on the mitigation issue under the ADA.

Nor is there any basis for UPS's assertion that the EEOC's interpretive guidance and regulations are internally inconsistent. First, the EEOC's position on mitigating measures in no way conflicts with its position requiring individualized assessments rather than creating a list of "disabilities." Second, there is no inconsistency between the EEOC's interpretation of the first prong of the ADA "disability" definition, and the EEOC's use of "controlled high blood pressure" as an example of an individual "regarded as" disabled.

A person with a condition such as diabetes, epilepsy or hypertension, the effects of which can be ameliorated with medication or diet, may not be substantially limited even without such measures. Thus, the EEOC's example may simply postulate a case too mild to be substantially limiting. More importantly, the first and third prongs of the "disability" definition are complementary, so that the EEOC's high blood pressure example may be covered under the first prong if medication or other mitigating measures are ignored, or under the "regarded as" prong if such measures are considered. In either event,

the point is that an individual such as Murphy is covered by the ADA, as Congress intended.¹⁴

Since it first adopted its interpretive guidance in 1991, the EEOC has consistently adhered to the interpretation that mitigating measures should be ignored in making the "disability" assessment under the ADA. That reasonable interpretation, which is based on the ADA's language, structure, and purposes, as well as the clear legislative history, is entitled to deference.

E. In This Case, Summary Judgment On The Threshold "Disability" Question Is Not Appropriate

This Court recognized in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that the ADA's threshold "disability" determination is a fact-intensive inquiry. This Court also has consistently emphasized that, when ruling on a summary judgment motion, federal courts must view the evidence in the light most favorable to the non-moving party, with disputed facts and inferences drawn in favor of that party and against the moving party. *See, e.g., Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997). Faithful application of that standard in this case, which the lower courts resolved on summary judgment, mandates a reversal and remand.

14. UPS also erroneously claims that the EEOC did not invite public comment with respect to the mitigating measures question and that, as a result, no deference is due to the agency's position. Resp. Br. 35. The EEOC's initial public notice made clear that the agency contemplated issuing regulations *and* interpretive guidance, and that comments were invited on the "disability" definition in particular. 55 Fed. Reg. 31192 (1990). The EEOC later published its proposed regulations and interpretive guidance in their entirety, inviting comment on any of it. 56 Fed. Reg. 8578 (1991). The EEOC received many comments addressed to the mitigating measures issue. *See Colker, supra*, 34 Harv. C.R.-C.L. Rev. at 154-55 & n.302 (discussing those comments and concluding that "the EEOC followed standard procedures regarding notice and comment in promulgating the mitigating measures rule"). That the EEOC finalized its interpretive guidance in response to those comments is to be expected, not condemned. UPS's argument would require that no deference be given to any regulatory language that appears in response to final public comments, a proposition for which UPS cites no authority.

There is no factual dispute in this case that Murphy's extraordinary, Stage IV hypertension is permanent, J.A. 67a, 71a, or that the long term impact is major organ damage, for instance to his heart, kidneys and eyes. *Id.* at 64a, 72a. There also is undisputed evidence in the record that, if Murphy were not medicated, he probably would be hospitalized. J.A. 80a-81a. Thus, if mitigating measures are ignored, the evidence precludes a grant of summary judgment to UPS on the "substantially limits" requirement.

Moreover, there is record evidence that Murphy is substantially limited in major life activities *even when medicated*. Murphy testified that he has brought his blood pressure below 140/90 with medication, but that the side effects significantly limited his ability to function. J.A. 55a-56a. Even the District Court acknowledged that Murphy cannot lower his blood pressure to normal levels "without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep and irritability." Pet. App. 16a. UPS asserts that Murphy faces no substantial limitations when medicated, but that position at most creates genuine issues of material, disputed fact that preclude summary judgment in either party's favor.

II. At A Minimum, There Are Genuine Issues Of Material, Disputed Fact As To Whether UPS "Regarded" Murphy As Disabled

The "regarded" as inquiry, like the "substantially limits" inquiry, is fact-intensive, and must be conducted on an individualized basis in each case. The Tenth Circuit, however, engaged in no such inquiry in rejecting Murphy's "regarded as" argument as a matter of law on summary judgment. The Tenth Circuit relied solely on the legal proposition that Murphy could not obtain DOT certification to drive commercial motor vehicles. *See* Pet. App. 5a. At a minimum, this Court must reverse and remand on the "regarded as" issue, with directions that the lower courts engage in the statutorily-required factual inquiries.

A. Reliance Upon DOT Regulations Confirms Rather Than Negates That UPS "Regarded" Murphy As Disabled

The ADA's threshold "disability" inquiry does not include evaluation of other statutory questions such as whether the individual

is qualified for the job. In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987), this Court rejected (under the Rehabilitation Act) the argument that qualification standards could be used to exclude individuals from the statutory "handicapped" definition, the very argument UPS is now pressing under the ADA.¹⁵ The *Arline* Court concluded that

[s]uch exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent. *Id.*

Nonetheless, UPS relies on job qualification standards to argue that Murphy does not satisfy the threshold "disability" requirement. If UPS relied on its own rule that no mechanic should have blood pressure above 140/90, it appears UPS would argue that it fired Murphy not because it "regarded" him as disabled, but because he failed to meet UPS requirements. As *Arline* makes clear, however, the later statutory inquiries into the essential functions of the job and the individual's qualifications exist for the precise purpose of dealing with the propriety of such standards and requirements. Thus, if medically sound standards preclude Murphy from working for UPS, then those standards may be a *justification* for UPS's views towards Murphy, and possibly a defense under the ADA, but they are not part of the threshold "disability" inquiry.

15. UPS asserts that Murphy's hypertension rendered him "unable to qualify" for the job, Resp. Br. 43 n.24, and that UPS fired Murphy "solely because his high blood pressure exceeded DOT limits." *Id.* at 43. UPS also asserts that there is no evidence that, when Murphy's blood pressure was retaken after UPS's nurse examined his file, the examiner issued Murphy even a temporary DOT health certificate. Resp. Br. 2, 49. But there is no reason the examiner would have done so, since Murphy already possessed a DOT certificate from his previous examination, and UPS did not pursue the process to have that certification revoked. See 49 C.F.R. § 391.47.

B. Murphy's Hypertension "Substantially Limits" And "Significantly Restricts" His Job Opportunities

Because there is no dispute that UPS was aware of Murphy's impairment, the sole issue is whether UPS viewed that impairment as substantially limiting Murphy in the major life activity of working. EEOC regulations provide that an individual is substantially limited in the major life activity of working when the person is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). UPS contends that Murphy's hypertension only precludes him from the particular job of being a UPS mechanic, Resp. Br. 44, but that assertion is false as a factual matter and, in any event, would not provide an appropriate basis for summary judgment in this case, even had the Tenth Circuit relied upon it.¹⁶

As UPS concedes, Resp. Br. 46 n.26, DOT certification is required for "all employers, employees and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. § 390.3(a). The United States represents that DOT had issued more than 7.1 million such certifications by 1994, when the events in this case occurred. See U.S. Br. 25 n.11. UPS asserts that Murphy was not entitled to work in any job requiring such certification. Moreover, UPS alone "is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory." Brief of UPS as *Amicus Curiae* in *Albertson's, Inc. v. Kirkingburg*, No. 98-591, at 1. Importantly, as UPS's action in this case demonstrates, if Murphy's hypertension precludes him from obtaining DOT certification, then he may be barred not only from driving a commercial motor vehicle in interstate commerce, but also from ancillary jobs such as servicing such vehicles. This is not a case where Murphy is precluded from a single, narrow category of opportunities.

The nurse who examined Murphy for DOT purposes testified that Murphy's hypertension would disqualify Murphy from any jobs

16. The Tenth Circuit never addressed this inquiry, instead rejecting Murphy's claim as a matter of law on the sole ground that he could not satisfy the "DOT's requirements for drivers of commercial vehicles." See Pet. App. 5a.

in the occupational categories of “heavy” or “very heavy” work. J.A. 78a. Further, the nurse testified that, in his opinion, Murphy should be restricted to “medium” work, “[o]r less,” *id.*, and that he (the nurse) “would restrict [Murphy] out of classes such as heavy construction work, steel workers, [or] any type of job that again requires a great deal of physical activity or endurance.” *Id.* at 79a. Likewise, Murphy’s treating physician testified that she would have concerns about him performing “very heavy” or “heavy” work. *Id.* at 66a.

Neither the statute, nor the EEOC’s regulation, requires that the employer view an employee as totally excluded from all—or even most—employment in order to be deemed to have “regarded” the employee as substantially limited in the major life activity of working. Thus, contrary to UPS’s assertion, excluding Murphy from all jobs that require DOT certification—as well as ancillary positions—“substantially limits” or “significantly restricts” his employment opportunities, even if it does not entirely eliminate them. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998) (“The Act addresses substantial limitations, not utter inabilities.”).

The Tenth Circuit erred in rejecting Murphy’s “regarded as” claim as a matter of law, without engaging in the class of jobs inquiry.

CONCLUSION

With all due respect, at a minimum there are genuine issues of disputed, material fact on the questions whether Vaughn Murphy’s severe hypertension substantially limits one or more of his major life activities and whether UPS “regarded” him as disabled. For the foregoing reasons, Murphy respectfully requests that this Court reverse the judgment of the Tenth Circuit, and remand the case for further proceedings.

Respectfully submitted,

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VAUGHN L. MURPHY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE
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3699

QUESTIONS PRESENTED

1. Whether the determination if petitioner's severe, Stage IV hypertension is a "disability" under the Americans with Disabilities Act, 42 U.S.C. 12102(2)(A), should be made without consideration of mitigating measures such as medication.

2. Whether there are genuine issues of disputed, material fact concerning whether respondent "re-garded" petitioner as "disabled" when respondent fired him because of his high blood pressure.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1992

VAUGHN L. MURPHY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE
SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

This case concerns the definition of "disability" in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* Congress delegated to the Equal Employment Opportunity Commission (EEOC) and Department of Justice authority to promulgate regulations and to enforce the provisions of the ADA. Both agencies have issued extensive regulations and interpretive guidance concerning the definition of the term "disability." The EEOC participated as *amicus curiae* in this case in the court of appeals. In response to the Court's invitation, the United States and the EEOC filed a brief as *amicus curiae* at the petition stage in this case.

STATEMENT

Petitioner brought this case under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, after he was dismissed from his job because he had high blood pressure. The district court granted summary judgment to respondent on petitioner's claim under the ADA. The court of appeals affirmed.

1. Petitioner has had high blood pressure (hypertension) since he was ten years old. For 22 years, petitioner worked as a mechanic. Pet. App. 13a. Despite the fact that his blood pressure was very high (approximately 250/160, see *id.* at 9a), it was controlled by medication. His own physician and respondent's physician both testified that, with medication, petitioner's "hypertension does not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do." *Id.* at 13a.

In August 1994, respondent hired petitioner as a mechanic, a position that required him to drive commercial motor vehicles on "road tests" and "road calls," and which therefore required satisfaction of Department of Transportation requirements. Pet. App. 13a-14a. Among those requirements is that the driver of a commercial motor vehicle in interstate commerce "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. 391.41(b)(7). The district court construed a subsequent DOT publication to provide that "in order to be physically qualified to drive a commercial motor vehicle * * *, an individual must maintain blood pressure less than or equal to 160/90." Pet. App. 16a. See note 10, *infra*.

At the time he was hired, petitioner's blood pressure was measured as 186/124. Pet. App. 16a. In September 1994, when respondent realized that petitioner's blood pressure exceeded 160/90, petitioner was retested; his blood pressure was approximately 160/104. See Pet. 2. Petitioner's treating physician "testified that [petitioner] is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects." Pet. App. 16a. On October 5, 1994, respondent fired petitioner. *Id.* at 17a.

2. The district court granted summary judgment to respondent, ruling that petitioner had failed to show that there were disputed issues of material fact as to whether he had a "disability." Under the ADA:

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12102(2).

The district court held that, for purposes of determining whether petitioner had shown that he had a disability, his "impairment should be evaluated in its medicated state." Pet. App. 29a. The court noted that "[t]he only limitation specifically set by [petitioner's] treating physician" was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 31a; see also *id.* at 13a ("[Petitioner's] own physician and UPS' medical expert each testified that [petitioner's] hypertension does not significantly restrict his activities and that in general he can function normally and

can engage in activities that other persons normally do.”). Analyzing whether petitioner was substantially limited in his major life activity of working, the court stated that such a limitation “is not of such a nature as to significantly restrict him in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities,” and that therefore petitioner’s “high blood pressure and its concomitant effects do not constitute a disability under the ADA.” *Id.* at 31a.¹

Addressing the “regarded as” prong of the statutory definition of “disability,” the district court concluded that “[respondent] did not regard [petitioner] as disabled, only that he was not certifiable under DOT regulations.” Pet. App. 32a. The court added that petitioner was not qualified for the job, *id.* at 33a-35a, that in any event respondent’s purported compliance with DOT regulations was a complete defense to petitioner’s ADA claim, *id.* at 35a-37a, and that any accommodation by respondent to petitioner’s condition “would have been an undue hardship on [respondent],” *id.* at 37a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court noted that petitioner’s own doctor had testified that “when his high blood pressure is medicated, he ‘functions normally doing everyday activity that an everyday person does.’” *Id.* at 4a. Relying on its holding in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (1997), cert. granted, No. 97-1943 (Jan. 8, 1999), that the “substantial

¹ Cf. 29 C.F.R. 1630.2(j)(3) (“With respect to the major life activity of *working*[,] [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes.”).

limitation” inquiry should assess the individual after mitigating or corrective measures are taken, the court held that petitioner’s high blood pressure is therefore not a disability. *Ibid.*

The court of appeals also affirmed the district court’s ruling that respondent did not regard petitioner as having an impairment that limits a major life activity. The court stated that “[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke,” but dismissed petitioner “because his blood pressure exceeded the DOT’s requirements for drivers of commercial vehicles.” Pet. App. 5a. In the court’s view, it followed that respondent “in its termination decision, did not regard [petitioner] as having an impairment that substantially limits a major life activity.” *Ibid.* The court expressly declined to reach the questions whether petitioner was otherwise “qualified” for the job under the ADA, *ibid.*, and whether the DOT regulations would provide a defense to petitioner’s ADA claim. *Id.* at 5a-6a.

4. On January 8, 1999, this Court granted review limited to the first and fourth questions presented in the petition for certiorari.

SUMMARY OF ARGUMENT

I. The court of appeals’ conclusion that petitioner had not shown an actual disability was wrong. There appears to be no dispute that petitioner has hypertension so severe that, if left unmedicated, it substantially limits all or most of his major life activities. Therefore, he has an actual disability. The fact that petitioner takes medication to relieve his condition may be relevant to a number of inquiries under the ADA, such as whether a requested accommodation by the employer is reasonable, whether the medication is sufficiently effec-

tive to render him qualified to perform his job, whether petitioner can satisfy federal safety standards, and whether he poses a direct threat to the health or safety of others. But the fact that he takes mitigating measures is of no relevance in the threshold inquiry as to whether he is disabled.

Although the ADA does not in terms address whether mitigating measures are to be taken into account in assessing the existence of a disability, Congress's intent on the question is clear. The relevant committee reports each stated with unusual clarity that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 52 (1990); see also *id.*, pt. 3, at 28. Moreover, assessing the existence of a disability without regard to mitigating measures is most consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individuals' abilities.

Assessing the existence of a disability without regard to mitigating measures is also most consonant with the structure of the statute, which, as noted above, provides for addressing issues arising out of the use of mitigating measures at stages of the analysis beyond the threshold determination of whether a disability exists. And it would inject uncertainty and instability into the system, because individuals could gain and lose status as "disabled" depending on the changing effectiveness of their regimen of mitigating measures and their changing decisions regarding whether those measures are warranted in light of their unwanted side effects.

The agencies entrusted with issuing regulations to carry out the ADA have consistently taken the position that the existence of a disability should be assessed without regard to mitigating measures. The EEOC has taken that position in interpretive guidelines that were subject to notice and comment at the same time as—and together with—the formal ADA regulations. Because the EEOC's guidelines state its interpretation of its own ADA regulations, they are entitled to controlling weight, and they therefore establish that mitigating measures should not be taken into account in assessing the existence of a disability.

II. The court of appeals also erred in holding that petitioner was not "regarded as" disabled under the third prong of the statutory definition of "disability." Respondent asserted that it dismissed petitioner because petitioner's blood pressure was too high to satisfy a federal requirement for driving a commercial motor vehicle in interstate commerce. If respondent were correct, that would establish that petitioner, because of his impairment (hypertension), was substantially limited in the major life activity of working, *i.e.*, he was severely restricted in a broad class of jobs for which his training and skills otherwise qualified him. At this threshold stage of the inquiry, it would be of no significance whether or not respondent bore any animus toward petitioner and whether or not respondent were correct in its view that petitioner could not satisfy the federal requirement. So long as respondent regarded petitioner as substantially limited in the major life activity of working, petitioner satisfied the statutory definition of being "regarded as" disabled.

To accept the court of appeals' theory would permit employers to circumvent the ADA's "qualification" inquiry in any "regarded as" case. The ADA prohibits discrimination only against a "*qualified* individual with

a disability." 42 U.S.C. 12112(a) (emphasis added). Accordingly, if respondent indeed regarded petitioner as unqualified under DOT medical standards, that may be relevant to whether petitioner is "qualified" for the job, though issues would remain regarding whether respondent's views of petitioner were correct and whether driving a truck is an "essential function" of the job, see 42 U.S.C. 12111(8). But respondent's views concerning petitioner's qualifications do not establish—or even support—respondent's contention that it did not regard petitioner as "disabled."

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON HAS A "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT

The term "disability" within the meaning of the Americans with Disabilities Act is defined in terms of three separate, alternative criteria. Under the first criterion—actual disability—a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. 12102(2)(A). Parsing that definition in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court explained that its application requires first the identification of the relevant impairment(s) and major life activities and then, "tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity." *Id.* at 2202.

Petitioner's high blood pressure is a "physical * * * impairment." As this Court explained in *Bragdon*, Congress's "repetition" in the ADA of that "well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." 118 S. Ct. at

2202. Under those interpretations, codified without relevant change in the EEOC's regulations implementing the ADA, see 29 C.F.R. 1630.2(h)(1), a "physical * * * impairment" is "[a]ny physiological disorder, or condition * * * affecting" a number of named body systems, including the cardiovascular system. *Ibid.* Petitioner's hypertension is a "physiological disorder" and it affects his cardiovascular system. Accordingly, he has a "physical impairment" within the meaning of the Act.

In determining whether petitioner is disabled within the meaning of the "actual disability" prong of the ADA, the remaining question is whether petitioner's impairment "substantially limits" any of petitioner's major life activities. The answer to that question turns on whether petitioner's impairment is viewed in its mitigated or unmitigated state.

A. Congress Intended That The Existence Of An Actual Disability Should Be Assessed Without Taking Into Account Mitigating Measures

The text of the ADA itself does not define "substantially limits" and therefore does not answer the question whether the inquiry into substantial limitation of a major life activity is to be undertaken with or without taking into account mitigating measures. The legislative history of the statute and its structure, however, indicate that Congress intended that the existence of an actual disability is to be analyzed without regard to mitigating or ameliorative measures.

1. Both the Senate and House Committee Reports on the ADA state in plain and direct terms that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989)

(Senate Rep.); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 52 (1990) (House Labor Rep.); see also *id.*, pt. 3, at 28 (1990) (House Judiciary Rep.) (“The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation.”). That expression of Congress’s understanding, repeated in the three relevant committee reports on the ADA, is unusually clear and unequivocal, and it makes Congress’s intent unmistakable.

The House Reports on the ADA reinforced the point by reciting specific examples of individuals who are disabled notwithstanding their use of mitigating measures that control their impairment:

[A] person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Labor Rep. at 52; accord House Judiciary Rep. at 28-29.²

² In discussing the third (“regarded as”) prong of the disability definition, the Senate Report also states that an

important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

2. This specific evidence of congressional intent on the question presented in this case is consistent with the overall structure and purpose of the statute. See *Brotherhood of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 157 (1996) (“[T]he statutory classification must be understood in accord with that objective.”). Congress determined that “not working is perhaps the truest definition of what it means to be disabled in America.” Senate Rep. at 9; House Labor Rep. at 32.³ In defining the scope of those covered by the ADA, Congress clearly intended to include those who *could* function in the workplace, but were excluded by the “discrimination by employers [that] remains an inexcusable barrier to increased employment of disabled people.” Senate Rep. at 9; House Labor Rep. at 33; see also *id.* at 43-46. To read the statute to exclude from its protections individuals who have mitigated their impairments (through either assistive devices or medicines, or self-adapta-

Senate Rep. at 24. An individual may fall within more than one of the three prongs of the Act’s definition of disability, and some impairments may present borderline cases with respect to one prong but not another. Accordingly, the Senate Committee’s comment that the “regarded as” prong “ensure[s]” protection of an individual with “controlled diabetes or epilepsy” under the Act is not inconsistent with the clear and unequivocal statements in the Senate Report and the two House Reports that such individuals would be covered under the “actual disability” prong as well. See *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 860 (1st Cir. 1998).

³ See also 136 Cong. Rec. H2428 (daily ed. May 17, 1990) (Rep. Owens); 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989) (Sen. Harkin); *id.* at S4985, S4987 (daily ed. May 9, 1989) (Sen. Harkin); 134 Cong. Rec. H2894 (daily ed. May 3, 1988) (Rep. Owens); *id.* at S5108 (daily ed. Apr. 28, 1988) (Sen. Weicker).

tions⁴) would negate one of the "critical goal[s] of this legislation—to allow individuals with disabilities to be part of the economic mainstream of our society." Senate Rep. at 10; House Labor Rep. at 34.⁵

⁴ See *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997), cert. denied, 522 U.S. 1048 (1998).

⁵ In *Bragdon*, this Court relied in part on the consistent judicial precedent under the Rehabilitation Act to construe the ADA. See 118 S. Ct. at 2208. Although no court squarely addressed the mitigating measures issue under the Rehabilitation Act, courts routinely treated persons who had mitigated the effects of their impairment as protected by the statute. See, e.g., *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) ("Reynolds's epilepsy substantially limits her ability to work. Even though medication controls her seizures, federal and state regulations and policies restrict the types of jobs available to her."); *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) ("undisputed" that applicant whose hearing aid corrected for hearing impairment "is a handicapped person"); *Longoria v. Harris*, 554 F. Supp. 102, 103-104 (S.D. Tex. 1982) (individual with right leg amputated below the knee who "was in no way restricted in mobility by his artificial leg" was handicapped individual). The Rehabilitation Act regulations are of little additional assistance, because they do not expressly address the question whether mitigating measures are to be taken into account. The Department of Health, Education, and Welfare declined to define the term "substantially limits" in the Rehabilitation Act because it did "not believe that a definition of this term is possible at this time." 42 Fed. Reg. 22,685 (1977). The Department of Labor, the agency charged with enforcing federal contractors' duty to take affirmative action to employ individuals with disabilities under Section 503(b) of the Rehabilitation Act, 29 U.S.C. 793(b), defined "substantially limited" to mean "likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." 41 Fed. Reg. 16,149 (1976); see also 41 C.F.R. 60-741.2 (1990) (codification of above definition at time ADA was enacted); 41 C.F.R. Pt. 60-741 App. A (1990) (interpretive guidance).

3. The structure of the ADA provides strong support for the proposition that mitigating measures should not be taken into account in determining the existence of a disability at the initial stage of the inquiry. Mitigating measures and reasonable accommodations are both types of "adjustments" that may have to be made on account of a disabling condition. Congress consistently provided in the ADA that the effectiveness of such adjustments should be considered after the initial determination of disability, and not as a part of that threshold inquiry.

An employer must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. 12112(b)(5)(A). Accommodations provided by an employer are similar to mitigating measures taken by an employee in that they are both types of adjustments that make it possible for a disabled person to work. Under the court of appeals' construction of the ADA, an impairment that requires mitigating measures is not a protected disability, while an impairment that requires employer accommodations is. "It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self-help." *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 863 n.7 (1st Cir. 1998).

Indeed, the two types of adjustment are often inextricably intertwined. Mitigating measures taken by an employee will often require some accommodation by the employer. For example, an employee may develop a serious and chronic medical condition that can be effectively controlled only by taking oral medication several times a day. In many employment situations, giving the employee a brief break so that the employee

could take the medication would be a reasonable accommodation. Yet, under the court of appeals' theory here, the employer could refuse that accommodation, because the employee—by virtue of his medication—ceases to be disabled and is therefore not entitled to the protections of the ADA.

The example can be generalized. Instead of requiring reasonable changes to the work environment (as when a reasonable accommodation is requested), an employee with a disability for which mitigating measures are taken simply requests the employer reasonably to accommodate the employee's condition by not penalizing the employee for taking the mitigating measure. Ironically, however, under the court of appeals' theory, in cases in which the mitigating measure is most effective and imposes the least burden on the employer, the employer would be most free to refuse it. Thus, an employee who requires a modification of his work duties because it is necessary to accommodate his uncontrollable high blood pressure may well be entitled to it (so long as it does not impose an undue hardship on the employer, see 42 U.S.C. 12112(b)(5)(A), or alter the essential functions of the job, see 42 U.S.C. 12111(8); 29 C.F.R. Pt. 1630 App. § 1630.2(o)). And an employee whose high blood pressure can be somewhat controlled by medication but who still must observe substantial limitations on his activities would also be entitled to reasonable accommodations from the employer. But the employee who takes medication that effectively controls the employee's high blood pressure would not be entitled to any accommodation from the employer—not even the simple permission from the employer to take the medication without losing his job or suffering other discrimination on the basis of impairment.

The effectiveness of the adjustment, whether in the form of mitigating measures or reasonable accommoda-

tions, is properly addressed by other ADA provisions, not as part of the threshold determination of liability. For example, the basic anti-discrimination mandate under the ADA does not come into play unless the employee is not only disabled but also "qualified" for the position in question. 42 U.S.C. 12112(a). If there is a question whether particular mitigating measures render the employee able to do the job, the ADA provides for addressing that issue through the inquiry into whether the employee is "qualified," not the initial inquiry into disability. If there is a question whether the mitigating measures enable the employee to perform the job safely or to be in compliance with federal safety regulations, the ADA permits the employer to take adverse action if the employee is "a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). See also 29 C.F.R. 1630.15(e) ("It may be a defense to a charge of discrimination * * * that a challenged action is required or necessitated by another Federal law or regulation."). The provisions in the Act addressing all of these "adjustment" questions at later stages of the analysis suggest that they should not be imported into the threshold disability determination—as the court of appeals' interpretation would require.

4. Finally, the court of appeals' theory would lead to a strange instability in the definition of disability. Determining whether an impairment substantially limits a major life activity is relatively straightforward, because it does not require difficult distinctions to be drawn among impairments based on the extent to which they can be ameliorated with medications or assistive devices and the extent to which the medications or devices impose new limitations or uncertainty themselves. Indeed, many forms of medication and other mitigating measures vary in their effectiveness

over time and may be accompanied by unwanted side effects. Under the court of appeals' theory that mitigating measures must be taken into account, an individual with an impairment that would be disabling if unmedicated would gradually become disabled if the medication loses its effectiveness, until new effective medication is obtained and the cycle would begin again. Or an individual's status would alternate between disabled and non-disabled as the individual altered his assessment of the desirability of taking an available medication. Although the EEOC has stated that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities," 29 C.F.R. Pt. 1630 App. § 1630.2(j), that regulation provides little guidance in addressing the moving target of disability under the court of appeals' theory in these kinds of cases. The result of requiring that mitigating measures should be taken into account, therefore, would be to inject considerable uncertainty into what should be a relatively straightforward threshold determination of the existence of a disability.

B. The Agencies Charged With Enforcing The ADA Have Determined That Mitigating Measures Should Not Be Taken Into Account, And That Determination Is Entitled To Deference

This Court in *Bragdon* reserved the question whether the substantiality of a limitation on a major life activity was to be assessed without regard to available mitigating measures. 118 S. Ct. at 2206. As the Court noted (*ibid.*), however, the EEOC and the Department of Justice have taken the consistent position that mitigating measures are not to be considered in making the "substantial limitation" determination. That view constitutes the reasonable position of the agencies charged

with the enforcement of the statute and should be followed in the instant case.

In resolving a question regarding the interpretation of a statute, this Court "ask[s] first whether 'the intent of Congress is clear' as to 'the precise question at issue.'" *Regions Hosp. v. Shalala*, 118 S. Ct. 909, 915 (1998) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). The ADA itself does not directly specify whether the existence or substantiality of the limitation should be measured with or without mitigating or ameliorative measures that the individual could take to improve his or her functioning.⁶ Since the ADA "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 915 (quoting *Chevron*, 467 U.S. at 843).

Congress required the EEOC to "issue regulations * * * to carry out [Title I of the ADA]." 42 U.S.C. 12116. "As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title [I] in court, the [EEOC]'s views are entitled to deference." *Bragdon*, 118 S. Ct. at 2209 (statutory citations omitted; citing *Chevron*, 467 U.S. at 844). "Such legislative regulations are given controlling weight unless they are

⁶ See *Washington v. HCA Health Servs.*, 152 F.3d 464, 467 (5th Cir. 1998) ("the text of the ADA is not unambiguously clear on this matter"); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997) ("[t]he ADA itself does not say whether mitigating measures should be considered"); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) ("nothing in the language of the statute itself * * * rules out" determining "the existence of a substantial limitation without regard to mitigating measures").

arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.⁷ In determining the meaning of such regulations, similarly, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Although the EEOC's regulation regarding the meaning of the term "substantially limits" does not itself expressly address the issue of whether mitigating measures should be taken into account, the EEOC has consistently interpreted its regulation to mean that mitigating measures are not to be considered in making the "substantial limitation" determination. First, to "respond to comments [to its proposed regulations] from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures," the EEOC explained that "the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures." 56 Fed. Reg. 35,727-35,728 (1991). Second, at the same time as it promulgated the regulations, the EEOC issued an "Inter-

⁷ Because Congress expressly delegated the authority to issue binding regulations to the EEOC, these "legislative" regulations are entitled to deference, as opposed to the mere "power to persuade" value sometimes accorded the EEOC's interpretations of Title VII published in the Code of Federal Regulations. Compare *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), with *id.* at 260 (Scalia, J., concurring), and *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988).

pretive Guidance" that had been subject to the same notice and comment as the regulations. Cf. *Bragdon*, 118 S. Ct. at 2209 (according *Chevron* deference to, *inter alia*, administrative guidance interpreting the ADA). The Guidance expressly provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j); accord 2 EEOC, *Compliance Manual* § 902.5 (1995); EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, II-2 (1992).

The Department of Justice, which is charged with promulgating regulations under Titles II and III of the ADA, has reached the same conclusion. See 28 C.F.R. Pt. 35 App. A § 35.104 ("[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services."); 28 C.F.R. Pt. 36 App. A § 36.104, at 583 (same); U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual*, II-2.4000 (1992) (same); U.S. Dep't of Justice, *The Americans with Disabilities Act: Title III Technical Assistance Manual*, III-2.4000 (1992) (same).⁸

Deference to administrative agency views is especially appropriate here, as the EEOC and Department of Justice "played a pivotal role in 'setting [the statutory] machinery in motion.'" *Ford Motor Credit*

⁸ The Department of Transportation, which also has authority to issue regulations under the ADA, 42 U.S.C. 12149, 12164, adopted the Department of Justice's definition of "disability." See 49 C.F.R. 37.3; 56 Fed. Reg. 45,584, 45,585 (1991).

Co. v. Milhollin, 444 U.S. 555, 566 (1980). When agencies promulgate their regulations virtually contemporaneously with a statute's enactment, utilizing the insights they derived from their participation in the legislative process, the rationale for granting deference is heightened. See *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979); *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131 (1978); *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *United States v. Moore*, 95 U.S. 760, 763 (1877).

C. The Court Of Appeals Erred In Ruling That Petitioner Is Not Disabled

In this case, neither the district court nor the court of appeals assessed petitioner's impairment in its unmitigated state. Petitioner has asserted that the record shows that in an unmitigated state his severe hypertension would damage his kidneys, heart, and eyes, and would lead to almost immediate hospitalization, Pet. 7; Pet. C.A. Br. 18-19, which would substantially limit him in the major life activities of "caring for oneself, performing manual tasks, walking, seeing, * * * and working." 29 C.F.R. 1630.2(i) (defining "major life activities"); *Bragdon*, 118 S. Ct. at 2205 (approving identical regulatory definition of "major life activities"). If petitioner can prove those facts, he is disabled under the ADA.

We note, as we explain in our amicus brief (at 11-12) in *Sutton v. United Air Lines*, No. 97-1943, that it is not enough to simply place into evidence that an individual has a diagnosable disorder or would be worse off without the mitigating measure. A plaintiff may not prevail under the "actual disability" prong of the definition unless the evidence shows that the unmitigated impairment restricts the "condition, manner or duration under which an individual can perform a particular

major life activity" compared to "the average person." 29 C.F.R. 1630.2(j)(1)(ii). If, as petitioner contends, he would have to be hospitalized, then he would of course meet that requirement, as he would be substantially limited in many life activities; unlike the "average person," an individual hospitalized for high blood pressure could not, for example, care for him or herself or work regularly. Thus, respondent was not entitled to summary judgment on the ground that petitioner did not have a "disability" under Section 12102(2)(A).

II. RESPONDENT COULD BE FOUND TO HAVE REGARDED PETITIONER AS DISABLED BECAUSE IT VIEWED HIM AS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING

An individual is "disabled" under the ADA not only if the individual has an impairment "that substantially limits one or more of the major life activities of such individual," 42 U.S.C. 12102(2)(A), but also if the individual is "regarded as having such an impairment," 42 U.S.C. 12102(2)(C). The record in this case demonstrated that respondent regarded petitioner as having an impairment (his high blood pressure, whether viewed in the mitigated or unmitigated state) that substantially limited petitioner in the major life activity of working. The Tenth Circuit erred in ruling to the contrary.

As noted above, the EEOC regulations generally provide that an individual is substantially limited in a major life activity if the individual is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which" the individual can perform the activity as compared to the "average person in the general popula-

tion.” 29 C.F.R. 1630.2(j)(1).⁹ The regulations provide special guidance, however, for determining the substantiality of a limitation on the major life activity of working. In that context, the regulations provide that “[t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” 29 C.F.R. 1630.2(j)(3)(i). The regulations add that “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” *Ibid.*

1. There is no dispute in this case that respondent was aware of petitioner’s high blood pressure and of its levels in both the mitigated and unmitigated state, and there appears similarly to be no dispute that high blood pressure is a “disorder” of petitioner’s cardiovascular system. Accordingly, respondent regarded petitioner as having a physical impairment within the meaning of the ADA. In determining whether petitioner is disabled under the “regarded as” prong of the definition, therefore, the sole remaining question is whether respondent viewed petitioner’s high blood pressure as substantially limiting one of his major life activities. In this case, petitioner alleges that the relevant major life activity is working. If respondent regarded petitioner’s high blood pressure as substantially limiting that activity (or if there was at least a genuine issue of material fact in this regard, see Fed. R. Civ. P. 56(c)),

⁹ The regulations also provide that “[t]he following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. 1630.2(j)(2).

then the grant of summary judgment to respondent was erroneous.

2. Viewed in the light most favorable to petitioner, the record demonstrates that respondent viewed petitioner as substantially limited in the major life activity of working. That evidence consisted of respondent’s consistent explanation that it dismissed petitioner because it believed “that he was not certifiable under DOT regulations.” Pet. App. 32a; see also *id.* at 5a (“[Respondent] terminated [petitioner] because his blood pressure exceeded the DOT’s requirements for drivers of commercial vehicles.”).¹⁰ Respondent clearly

¹⁰ In our brief at the petition stage of this case (at 17 n.5), we noted that the courts below erred in construing the DOT standards to preclude someone with blood pressure higher than 160/90 from operating a commercial motor vehicle in interstate commerce. The reason for that error has become clear.

The basic regulation at issue prohibits the operation of commercial motor vehicles by individuals who have a “current clinical diagnosis of high blood pressure *likely to interfere with his/her ability to operate a commercial motor vehicle safely.*” 49 C.F.R. 391.41(b)(6) (emphasis added). The regulations further provide that, when an individual is tested under that standard, “[i]f the blood pressure is consistently above 160/90 mm. Hg., further tests *may be necessary* to determine whether the driver is qualified to operate a commercial motor vehicle.” 49 C.F.R. 391.43(f) (emphasis added). Thus, although the general rule prohibits individuals whose high blood pressure would interfere with vehicle operation from operating commercial vehicles, blood pressure above 160/90 does not necessarily or categorically trigger that prohibition.

The district court referred (Pet. App. 15a-16a) to a document that is now entitled “Medical Advisory Criteria for Evaluation Under 49 CFR Part 391.41.” That document addresses various medical criteria for commercial driver’s licenses, including high blood pressure. In its current version (available at <http://mcregis.fhwa.dot.gov/medical.htm> (last modified Apr. 8, 1998)), that document begins:

Unlike regulations which are codified and have a statutory base, the recommendations in this advisory are simply guidance established to help the medical examiner determine a driver's medical qualifications pursuant to Section 391.41 of the Federal Motor Carrier Safety Regulations (FMCSRs). The Office of Motor Carrier Research and Standards routinely sends copies of these guidelines to medical examiners to assist them in making an evaluation. The medical examiner may, but is not required to, accept the recommendations. Section 390.3(d) of the FMCSRs allows employers to have more stringent medical requirements.

Printed versions of this document are divided into specific subdocuments that address specific medical criteria, and the subdocuments do not include the above-quoted language. But we are informed that DOT has typically sent out printed versions of this document or its subdocuments with a cover letter that includes the above-quoted language or its close equivalent.

With respect to blood pressure, the medical regulatory criteria recommends that no driver with blood pressure over 181/105 should be qualified to operate a commercial motor vehicle and that drivers with blood pressure between 160/90 and 181/105 may drive for three months and then may be retested to determine whether their blood pressure has been reduced to 160/90 or below. But, as the above quoted language makes clear, the fact that petitioner's blood pressure is above 160/90 does not absolutely preclude him from driving a commercial motor vehicle in interstate commerce.

The record in this case appears to contain only a 1988 printed version of the subdocument regarding medical criteria for high blood pressure. See C.A. App. 85-87. The medical substance of that document has not changed in relevant respects since 1988. Because the general statements regarding the advisory nature of the document, however, were typically included only in a cover letter—and not in the subdocuments themselves—the version of the blood pressure criteria subdocument in the record does not include the information regarding the nonbinding, advisory status of its recommendations. The courts below accordingly were apparently unaware that the document did not state a mandatory DOT policy regarding qualifications of individuals with blood pressure above 160/90. We believe it to be important, however, to clarify that DOT currently and at the time of the events in this

understood—indeed, relied upon—the fact that DOT certification is required for “all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce.” 49 C.F.R. 390.3(a). Under any reasonable view of what is a substantial limitation of the major life activity of working, that describes either a “class of jobs or a broad range of jobs in various classes.” 29 C.F.R. 1630.2(j)(3)(i).¹¹ Petitioner's inability to perform all such jobs would accordingly be a “substantial limitation” on his major life activity of working. Therefore, by regarding petitioner as unable to satisfy the DOT certification requirements, respondent regarded petitioner as substantially limited in his major life activity of working.

3. The court of appeals rejected petitioner's argument that respondent regarded him as substantially limited in the major life activity of working, on the ground that “[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke,” but rather on respondent's belief that “his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles.” Pet. App. 5a. The court's reasoning is mistaken; if respondent regarded petitioner's impairment (his high blood pressure) as exceeding DOT's requirements, it thereby regarded him as substantially limited in the major life activity of working.

case has viewed the medical advisory criteria documents as nonbinding recommendations for medical examiners. By contrast, the regulations state DOT's official policy regarding the medical qualifications for driving a commercial motor vehicle in interstate commerce.

¹¹ DOT has informed us that by 1994, when the events at issue in this case occurred, at least 7.1 million commercial drivers licenses had been issued.

The court of appeals' reasoning appears to be based on an unstated premise that an individual's status as disabled under the "regarded as" prong depends on proof that the employer acted with animus toward that individual or his impairment or with a misperception of the nature or consequences of that impairment. The definition of "disability" in the ADA, however, does not turn on whether an individual has been subject to invidious discrimination; it simply turns on whether the individual is, or is regarded as, substantially limited in a major life activity. Thus, it may be accepted that respondent did not have an "unsubstantiated fear" concerning the health consequences of petitioner's high blood pressure, and it may be accepted (although it appears that the record is not sufficient to support summary judgment on this point) that respondent believed that petitioner was perfectly able to drive its vehicles and perform all the duties of his job as a mechanic for respondent, but was limited in so doing by DOT regulations. Nonetheless, even if respondent harbored no animus toward petitioner, it still regarded him as disabled under the "regarded as" definition, because it regarded his impairment as substantially limiting his ability to obtain or keep a "class of jobs."

4. To accept the court of appeals' contrary theory would permit employers to circumvent the ADA's "qualification" inquiry in any "regarded as" case. As noted above, the basic prohibition of Title I of the ADA does not forbid an employer to act adversely against an individual with a disability; rather, the employer may not discriminate against "a *qualified* individual with a disability." 42 U.S.C. 12112(a) (emphasis added). The inquiry into whether the employee is "qualified" is separate from the inquiry into whether the individual has a "disability." Indeed, it is essential to the ADA's purpose of eliminating discrimination based on "pre-

judice, stereotypes, or unfounded fear," *School Bd. v. Arline*, 480 U.S. 273, 287 (1987), that the inquiry into whether the individual is qualified turns on the individual's actual qualifications—not the way in which the employer regards him. Moreover, the question whether an individual is "qualified" under the ADA turns on whether the individual "can perform the *essential functions* of the employment position," 42 U.S.C. 12111(8) (emphasis added), not whether the individual satisfies every criterion that the employer has in fact used as a job qualification in the past. That "essential function" inquiry is also crucial to achievement of the ADA's goals.

Under the court of appeals' theory, both of these crucial elements of the "qualification" inquiry—the need to show actual qualification and the inquiry into "essential functions" of the job—would simply be eliminated in cases involving a "regarded as" disability.¹² That is because the court of appeals' reasoning essentially reduces to the proposition that, because respondent regarded petitioner as unable to satisfy a job qualification (DOT certification), respondent therefore did not regard petitioner as substantially limited in

¹² The need for the inquiry into actual (as opposed to perceived) qualification can be illustrated by this very case. As noted above, see note 10, *supra*, respondent (and both courts below) erred in concluding that DOT regulations precluded petitioner from operating a commercial motor vehicle in interstate commerce. Because this job qualification was mistakenly addressed under the "regarded as" prong of the disability definition, however, it required proof only as to what respondent regarded DOT regulations to require, not what those regulations actually require. Under the "regarded as disabled" inquiry, respondent's mistake would have little to do with its liability under the ADA. Had the issue been addressed properly under the "qualification" inquiry, however, petitioner's actual qualification to drive a commercial motor vehicle could be a dispositive issue in this case.

the major life activity of working. In most (or perhaps every) "regarded as" case, however, the employer could make a similar assertion: it could claim that it did not regard the employee as substantially limited in a major life activity, but rather as unable to satisfy what it (the employer) believed to be a job qualification. Under the court of appeals' reasoning, that assertion, if true, would result in a determination that the employee was not "regarded as" disabled, and it would insulate the employer from all obligations under the ADA.

Nor would the problem be limited to the "qualification" inquiry under the ADA. Presumably, the court of appeals would adopt the same reasoning if, for example, an employer in a "regarded as" case asserted that the employer had dismissed an employee not because the employer regarded the employee as disabled, but because the employer regarded the employee as having an impairment that posed a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). The ADA contemplates that an employer would have a defense to liability if the employee actually posed such a "direct threat" and no "reasonable accommodation * * * would either eliminate the risk or reduce it to an acceptable level." See 29 C.F.R. Pt. 1630 App. § 1630.2(r). But that defense arises after a determination that the employer regarded the employee as disabled; it is a justification for the employer's view, not a denial of it.

Under the court of appeals' reasoning, the employer in a "regarded as" case could pretermitt the statutory inquiry into whether the employee actually posed a direct threat and whether a reasonable accommodation could eliminate or acceptably reduce that threat. Instead, the employer could simply claim that the employee was dismissed not because the employee was regarded as substantially limited in the major life

activity of working, but because the employer regarded the employee as posing a direct threat to other individuals in the workplace. So long as the employer actually did regard the employee as posing a direct threat to other individuals in the workplace, the employee would not be "regarded as" disabled, and the employer's ADA obligations would cease. The fact that the employee did not actually pose a direct threat or that a reasonable accommodation would have eliminated that threat would be irrelevant. Once again, importing these other statutory standards and defenses into what should be a relatively straightforward threshold inquiry into "disability" would threaten to unravel the statutory scheme that Congress enacted.

5. In short, although an ostensible failure to satisfy DOT standards may well assist respondent in showing that petitioner was not qualified for the job, see 42 U.S.C. 12112(a), that he would "pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), or that he failed a "qualification standard[]" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. 12113(a), it does not establish that petitioner was not regarded as having a physical impairment that substantially limited his major life activity of working. See 29 C.F.R. 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by another Federal law or regulation"); *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court, U. S.

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No. 97 - 1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,

v.

Petitioner,

UNITED PARCEL SERVICE, INC.,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**BRIEF AMICUS CURIAE OF THE NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Should the determination of whether Murphy's severe, Stage IV hypertension is a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without considering his use of mitigating measures such as medication?

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INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.¹ NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1997); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S.Ct. 1466 (1997); *Cleveland v. Policy Management Systems Corp.*, No. 97-1008, *cert. granted*, ___ U.S. ___, 67 U.S.L.W. 3228 (U.S. Oct. 5, 1998); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 748 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

¹ The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. With the exception that counsel for petitioner, Kirk W. Lowry, is a member of NELA and, as such, pays general membership dues, no persons other than the *Amicus Curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA members have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect and defend the interests of employees involved in workplace disputes, including workers who are involved in ADA litigation.

This case presents an opportunity to clarify that the question of whether an individual has a "disability" should be made without considering the individual's use of mitigating measures such as medications, prosthetic devices and auxiliary aids. NELA submits this brief to urge the Court to conclude that the individual's use of mitigating measures should not be considered when determining whether the person has a substantial limitation of a major life activity.

STATEMENT OF THE CASE

Vaughn Murphy has had severely high blood pressure for the past 35 years. When his condition is not medicated, his blood pressure runs approximately 250/160. Even when medicated, Murphy's ability to lift, eat, hear, see, exercise and run are adversely affected. When Murphy tries to reduce his blood pressure to normal levels through medication, Murphy suffers severe side effects, including loss of memory, impotence, lack of sleep and stuttering. If he reduces his blood pressure to below 160/90, Murphy is largely unable to function, according to his physician.

Murphy worked as a mechanic for 22 years. He used levers and devices to lift heavy objects, avoided heavy work, running or performing work above his head. He was under doctor's orders not to hold a job which involved heavy lifting of 200 pounds or more.

In August, 1994, Murphy applied for a mechanic position with respondent, United Parcel Service ("UPS"). UPS requires its mechanics to have a commercial drivers license and a Department of Transportation ("DOT") health card. Murphy had a commercial drivers license. During a physical examination by a DOT examiner which he took during the application process, Murphy's blood pressure was 186/124. The DOT examiner issued Murphy a DOT health card pursuant to DOT regulations. UPS hired Murphy as a mechanic on August 18, 1994.

In mid-September, 1994, a UPS company nurse who reviewed Murphy's file discovered Murphy's record of having high blood pressure. Both the nurse and UPS stated that DOT regulations automatically excluded anyone with blood pressure exceeding 160/90 from holding a commercial drivers license. On September 26, 1994, Murphy's blood pressure was tested again but was still above DOT's standard of 160/90. On October 5, 1994, UPS terminated Murphy's employment.

Murphy filed suit against UPS under the ADA. To pursue his ADA claim, Murphy initially must show that he was an "individual with a disability" as defined by the ADA. This will require Murphy to show that he has a substantial limitation of one or more of his major life activities, that he has a record of such a disability, or is "regarded" by UPS having such a disability. *See* 42 U.S.C. §12102(2)(A), (B) and (C).

The District Court granted UPS' Motion for Summary Judgment. *Murphy v. United Parcel Service, Inc.*, 946 F.Supp. 872 (D. Kan. 1996). The court first determined that Murphy's severe hypertension should be examined in its medicated state when determining whether he has a "disability" under the ADA. *Id.* at 880-81. The court then concluded that no reasonable factfinder could conclude that Murphy's high blood pressure in a medicated state substantially limited him in any major life activities. *Id.* at 881-82. The District Court also rejected Murphy's claim that UPS "regarded" him as disabled, reasoning that UPS only regarded him as being not certifiable under DOT regulations. *Id.*

The Tenth Circuit affirmed the District Court's decision granting summary judgment. Based on its decision in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999 WL 5326 (U.S., Jan. 8, 1999), the Tenth Circuit concluded that the first prong of the ADA's definition of disability required consideration of mitigating measures, and, as a matter of law, Murphy's severe high blood pressure in its medicated state did not substantially limit him in any major life activities. The Tenth Circuit also affirmed the District Court's decision that Murphy failed to show that UPS "regarded" him as having a disability under the ADA, reasoning that it fired Murphy because his blood pressured exceeded the DOT's requirement for drivers of commercial vehicles, not because of an unsubstantiated fear that Murphy would have a heart attack or a stroke.

SUMMARY OF THE ARGUMENT

The ADA was adopted by Congress in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12182(b)(1). Many of those individuals with disabilities often use mitigating measures, such as medications, prosthetic devices or auxiliary aids to accommodate their disabilities.

The ADA is a remedial statute which must be construed broadly to effectuate its purpose. Some courts have narrowly interpreted the term "disability" by ruling that an individual's use of a mitigating measure should be taken into consideration when determining whether the individual is covered under the ADA. However, eight of the ten Circuit Courts of Appeals that have addressed the question have rejected that position. Compare *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Kirkenberg v. Albertson's, Inc.*, 143 F.3d 1228, 1232-33 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857-65 (1st Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996); with *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999

WL 5326 (U.S. Jan. 8, 1999); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997).² *Amicus* asks this Court to embrace the views of the overwhelming number of courts that have broadly interpreted the statute to exclude consideration of mitigating measures.

The ADA's definition of disability is derived from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B). Courts interpreting the definition of "handicapped individual" under the Rehabilitation Act have routinely excluded consideration of mitigating measures. Both the ADA's legislative history and the Equal Employment Opportunity Commission's ("EEOC") Interpretive Guidance also state that mitigating measures should not be considered when determining whether an individual is substantially limited in a major life activity and therefore covered under the ADA. Interpreting the ADA to exclude consideration of mitigating measures is consistent with the statute's broad remedial purposes.

² In *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996), the Fifth Circuit stated in *dicta* that an individual's use of mitigating measures should be considered when determining whether the individual is substantially limited in a major life activity. *Id.* at 191-92 n. 3. However, the Fifth Circuit abandoned that position in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 n. 5 (5th Cir. 1998).

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED WHEN DETERMINING WHETHER AN INDIVIDUAL HAS A DISABILITY UNDER THE FIRST PRONG OF THE ADA'S DEFINITION OF DISABILITY.

A. Mitigating Measures Were Not Considered Under the Rehabilitation Act.

The ADA defines the term "disability" as:

- (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (b) a record of such an impairment; or
- (c) being regarded as having such an impairment.

42 U.S.C. §12102(2). The ADA's definition of disability is derived "almost verbatim" from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B); *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2202 (1998). The ADA provides at 42 U.S.C. §12201(a) that:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards used under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by the Federal agencies pursuant to such title.

In *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196 (1998), this Court interpreted that language to "require [] us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 2202.

The Rehabilitation Act's regulations define "physical or mental impairment" as:

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. §84.3(j)(2)(i) (1997).

The Rehabilitation Act's regulations contain a representative list of "major life activities" and define the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3(j)(2)(ii) (1997). The list of major life activities "is illustrative, not exhaustive." *Bragdon*, 118 S.Ct. at 2205 (concluding that reproduction is a major life activity even though not specifically enumerated in the regulations).

This Court observed in *Bragdon* that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Id.* at 2208 (citations omitted). Courts have never considered the use of mitigating measures when interpreting the definition of "handicapped" under the Rehabilitation Act and its regulations. Therefore, this Court should similarly exclude consideration of the use of mitigating measures

when analyzing whether the individual is substantially limited in one or more major life activities.

In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), for example, the Ninth Circuit held that epilepsy was a handicap even though it was controlled by medication. *Id.* at 574. In *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991), the Second Circuit stated that "[w]e are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as being substantially limited in their ability to care for themselves." *Id.* at 641. The First Circuit concluded in *Cook v. State of Rhode Island Dep't of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir. 1993) that an individual with morbid obesity had a handicap under the Rehabilitation Act, even though she could treat the manifestations of her dysfunctional metabolism through fasting or undereating. *Id.* at 24.

Although the plaintiff's diabetes, carpal tunnel syndrome and depression were controllable with medication, the court in *Miles v. General Services Administration*, 1995 WL 766013 (E.D. Pa. 1995) concluded that the plaintiff was handicapped within the meaning of the Rehabilitation Act. The court in *Liff v. Secretary of Transportation*, 1994 WL 579912 (D.D.C. 1994) rejected the defendant's argument that the plaintiff was not "handicapped" because her depression was controlled by medication, reasoning that "Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regard to medication." The court relied, in part, on the language and purpose of the Rehabilitation Act in *Fal-*

lacaro v. Richardson, 964 F.Supp. 87 (D.D.C. 1997) for its conclusion that a person who was totally blind was handicapped under the statute, even though she had 20/20 vision with corrective lenses.³

In *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995), the Tenth Circuit observed that "Congress intended that the relevant case law developed under the Rehabilitation Act be generally be applicable to the term 'disability' under the ADA." *Id.* at 897 (citing 29 C.F.R. §1630, App. §1630.2(g)). This Court should reject the Tenth Circuit's attempt in the instant case to disregard its own admonition and construe the ADA's definition of disability more narrowly than the Rehabilitation Act definition of the term of "handicap." Because the Rehabilitation Act's definition of "handicap" did not require that mitigating measures be considered, repeating the same definition of "disability" under the ADA clarified that Congress intended to incorporate that interpretation into the ADA as well.

³ See also, e.g., *Strathie v. Dep't of Transportation*, 716 F.2d 227, 228-29 (3d Cir. 1983) (undisputed that individual with a hearing impairment was handicapped under the Rehabilitation Act even though with the use of a hearing aid his hearing was corrected to an acceptable level under relevant state law); *Beutivigna v. U.S. Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (accepting without discussion that individual with insulin-dependent diabetes was handicapped under the Rehabilitation Act).

B. The ADA's Legislative History Demonstrates that Mitigating Measures Should Not Be Considered When Determining Whether an Individual Has a Disability.

The starting point for interpreting a statute "is the language of the statute itself." *Arnold v. United Parcel Service*, 136 F.3d 854, 857 (1st Cir. 1998) (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). Most courts that have examined the question have concluded that the ADA does not clearly state whether mitigating measures should be considered when examining whether an individual has a substantial impairment of one or more major life activities. See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 467 (5th Cir. 1998); *Arnold v. United Parcel Service*, 136 F.3d 854, 859 (1st Cir. 1998) ("A reasonable person could interpret the plain statutory language to required an evaluation either before or after ameliorative treatment."); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

If a statute's text is not absolutely clear, the next source for guidance to ascertain the statute's meaning is its legislative history. *Arnold*, 136 F.3d at 858. The ADA's legislative history plainly demonstrates that mitigating measures should not be considered when determining whether an individual has a substantial impairment of one or more major life activities.

In describing the first prong of the definition of disability, the House Judiciary Committee Report states that:

The impairment should be assessed without considering whether mitigating measures, such as auxilia-

ry aids or reasonable accommodations, would result in less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment are controllable by medication. H.R. Rep. No. 101-485 (III) at 28, reprinted in 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

Similarly, the House's Education and Labor Committee Report provides that:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. H.R. Rep. No. 101-485 (II) at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report").

The Senate Report also provides that determining whether a person has a disability under the ADA "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S.Rep. No. 101-116 at 23 (1989) ("Senate Report").

The Senate Report does contain language which some courts have interpreted to be inconsistent with the position that the question of whether a condition is covered under the "first prong" of the definition of dis-

ability excludes consideration of mitigating measures.⁴ See e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998). While discussing the third prong of the definition of disability, the Senate Report states that:

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Senate Report at 24.

In *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998), the First Circuit concluded that these two passages from the Senate Report were not inconsistent, reasoning that "these passages can be easily squared by recognizing that an individual could have a 'disability' under *both* prong one (having an impairment that substantially limits a major life activity) *and* prong three ('regarded as' having such an impairment) at the same time; one does not preclude the other." *Id.* at 860 (emphasis in original). Moreover, the House Reports, which came after the Senate Reports, did not incor-

⁴ The "first prong" of the definition of disability refers to whether the individual has a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(2)(A). The "third prong" of the definition of disability refers to someone who does not have a "disability" under the first prong of the definition but is "regarded" by the employer as having such an impairment. 42 U.S.C. §12102(2)(C).

porate the Senate Report's discussion of medicated conditions under the third prong of the disability of definition. That omission led the Fifth Circuit to conclude that:

Given that much of the structure and language of the House Report was borrowed from the Senate Report, it seems that the House Committees were aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 468 (5th Cir. 1998).⁵

C. The EEOC's Interpretive Guidance Also States that Mitigating Measures Should Not Be Considered When Determining Whether an Impairment Substantially Limits a Major Life Activity.

If the plain language and legislative history do not clarify the statute's meaning, a court must defer to the interpretation of the agency charged with enforcing the statute, provided the interpretation "flows rationally from a permissible construction of the statute." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (citations omitted). The ADA authorized the EEOC to issue regulations to enforce the statute. 42 U.S.C. §12116 (1994). The EEOC exercised that author-

⁵ The Fifth Circuit also observed that "... the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

ity by promulgating regulations and attaching to those regulations guidelines for interpreting the ADA. *Id.* at 863. Although the EEOC's interpretive guidelines are not, like regulations, controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly result for guidance." *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2207 (1998) (citation omitted).⁶

In its Interpretive Guidance, the EEOC states that the existence of an impairment must be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(h). The guidelines later elaborate that the "determination of whether an individual is substantially limited in a major life activity" must be made "without regard to mitigating measures such as medicines or assistive or prosthetic devices." 29 C.F.R. pt. 1603 App. §1630.2(j).⁷ The EEOC's Interpretive Guidance also provides that:

An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable

⁶ In *Bragdon*, this Court looked to the EEOC's pronouncements for guidance in concluding that an individual's asymptomatic HIV disease was a substantial limitation of the major life activity of reproduction. *Id.* at 220.

⁷ The United States Department of Justice ("DOJ"), which enforces the ADA's prohibition of disability discrimination in employment in state and local government entities, has also stated that "disability should be assessed without regard to the availability of mitigating measures." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998) (quoting 28 C.F.R. Part 35, App. A §35.104).

to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. App. §1630.2(j).

This Court has held that an agency's interpretation of a statute it administers "should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984)). There is no conflict between the EEOC's interpretive guidance and either the statute or its legislative history. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996). Rather, "[t]he EEOC's interpretation is not merely 'permissible;' it is entirely consistent with the ADA's legislative history and broad remedial purposes." *Arnold*, 136 F.3d at 864.

D. Interpreting the First Prong of the ADA's Definition of Disability to Exclude Consideration of Mitigating Measures Is Consistent with the Statute's Broad Remedial Purpose.

When construing a statute, a court must "interpret the words of [the statute] in light of the purposes Congress sought to serve." *Arnold v. United Parcel Services, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (citations omitted). The ADA is a "broad remedial statute." *Penny v. United Parcel Service, Inc.*, 128 F.3d 408, 414

(6th Cir. 1997). Remedial legislation like the ADA "should be construed broadly to effectuate its purpose." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998); see also *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (observing that the Federal Rehabilitation Act and its regulations should be interpreted broadly).

In the employment discrimination arena, the ADA's fundamental purpose is "to protect individuals who have an underlying medical condition or other limiting impairment, but who *are* in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original) (citations omitted). In *Arnold*, the First Circuit concluded that "[c]onceptually, it seems more consistent with Congress' broad remedial goals, and it also makes more sense, to interpret the words 'individual with a disability' more broadly, so the Act's coverage protects more types of people against discrimination." 136 F.3d at 861.⁸ The Ninth Circuit reached the same conclusion in *Kirkenburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998), cert. granted, ___ U.S. ___, No. 98-591, 1999 WL 5332 (1999), reasoning that the ADA "was drafted in broad language in order to protect a large class of physically

⁸ The *Arnold* court's interpretation mirrors this Court's observation in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) that when interpreting the definition of "handicap" under the Federal Rehabilitation Act "a broad definition, one not limited to the so-called 'traditional handicaps,' is inherent in the statutory definition." *Id.* at 280 n. 5.

impaired individuals from unwanted discrimination—it was not drafted narrowly to protect only those with the most severe disabilities.” *Id.* at 1233. Employers are not jeopardized by a broad interpretation of the term “disability” because individuals seeking protection under the statute must still be “qualified” to perform the essential functions of the job. 42 U.S.C. §§12111(8), 12112(a) (1994); see *Kirkenburg*, 143 F.3d at 1233; *Arnold*, 136 F.3d at 861-62.

II. THE ADA SHOULD NOT BE INTERPRETED IN A MANNER THAT WOULD DISCOURAGE INDIVIDUALS FROM ATTEMPTING TO CONTROL THEIR IMPAIRMENTS.

In *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998), the court stated that concluding that Arnold’s diabetes was not covered under the prong of the ADA’s definition of disability would provide him with a disincentive to controlling his impairment, reasoning that:

UPS’s interpretation could very well produce results antithetical to its expressed concerns and to the Act’s attempt to take such concerns into account that a person with a disability is able to use medical knowledge and technology to overcome many of the effects of his illness (in Arnold’s case, by a continuing regimen of medicine, proper eating habits and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination because of his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes

under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self help.

Arnold, 136 F.3d at 863 n. 7.

Endorsing the Tenth Circuit’s position on mitigating measures would not merely deter individuals from taking advantage of medical knowledge and technology. Rather, it would also deter individuals from developing “self-accommodations” for their impairment. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 693 (1998), for example, the Court held that a police officer, blinded in one eye, was disabled under the first prong of the ADA’s definition of disability even though he had developed “subconscious adjustments” which enabled him to compensate for his limitations. *Id.* at 627. According to the Eighth Circuit, Doane’s “brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments should not take him outside the protective provisions of the ADA.” *Id.* at 627-28. Similarly, the plaintiff in *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), had a learning and reading impairment which significantly restricted her ability to timely identify and decipher the written word. *Id.* at 329. Dr. Bartlett developed “self-accommodations” which improved her ability to spell and her performance on word identity and word attack tests. *Id.* at 326. The Second Circuit concluded that “[h]er history of

self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population 'do not take [her] outside the protective provisions of the ADA.'" *Id.* at 329 (quoting *Doane*).

An individual who elects not to use an available mitigating measure because it would result in exclusion from the ADA's coverage is still placed in a precarious position because they may no longer be a "qualified" individual with a disability, 42 U.S.C. §12112(8), as defined by the ADA. In *Siefkin v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), for example, the defendant hired Siefkin, an individual with diabetes, as a probationary police officer, believing that he "could monitor his medical condition sufficiently to allow him to perform the duties of a police officer." *Id.* at 666. However, he failed to monitor his diabetes properly on one occasion and suffered a diabetic reaction while on duty driving a patrol car. *Id.* at 665. The employer terminated him and refused to give him a second chance to show that he could control his diabetes. *Id.* at 665, 666-67. The Seventh Circuit upheld the district court's dismissal of the case for failure to state a claim, reasoning that the plaintiff was fired because he failed to control a controllable disease. The Eighth Circuit reached the same conclusion in *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). Despite Burrough's assurance that he could keep his diabetes under control, he twice suffered a severe diabetic episode due to poor timing of his meals and activities which rendered him unable to perform his job as a police officer. The Eighth Circuit, relying on *Siefkin*, upheld the District Court's dismissal of his ADA claim, reasoning that

it was legitimate for the city to expect and require its patrol officers to be functional and alert at all times while on duty. *Id.* at 507. As the facts in both *Siefkin* and *Burroughs* illustrate, interpreting the ADA in a manner that discourages individuals from controlling their impairments could also jeopardize public safety.

CONCLUSION

The judgment of the Court of Appeals for the Tenth Circuit should be reversed and the case remanded to the District Court for a full hearing on its merits.

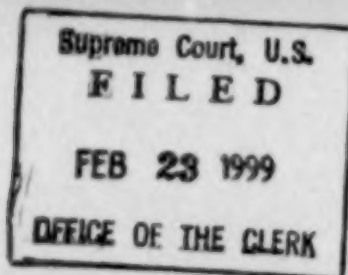
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NO. 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,
Petitioner,
v.
UNITED PARCEL SERVICE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF OF AMICI CURIAE IN SUPPORT OF
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No. 97-1992

VAUGHN MURPHY, Petitioner

v.

UNITED PARCEL SERVICE, INC., Respondent.

STATEMENT OF AMICUS INTEREST

The Commonwealth of Massachusetts, the State of West Virginia and the undersigned __ amici states have a direct interest in the resolution of this case. First, the states seek to assure that their citizens obtain full protection and coverage under the Americans with Disabilities Act ("ADA"). Second, many of the amici states follow federal law in deciding employment-related disability issues under their state law and would likely be impacted by the decision in this case. Finally, the States have a strong public policy interest in this case because of their interest in: (1) promoting self-help of disabled persons without putting at risk their protection under the ADA, including their right to a reasonable accommodation; (2) assuring consistent coverage under the ADA, as a threshold matter, for persons with similar disabilities under state and federal law; and (3) providing a forum

for challenging automatic job disqualifications based on underlying medical conditions.

STATEMENT OF FACTS

The Commonwealth of Massachusetts, the State of West Virginia and the undersigned adopt the statement of facts set forth in the Petitioners' Briefs in *Murphy v. United Parcel Service, Inc.* No. 97-1992.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision, if affirmed, would have the deleterious effect of disadvantaging people with underlying impairments who engage in self-help, by denying them protection under the ADA, if their mitigating measures are successful. Such employees who have mitigated their impairments and would not be considered disabled under the ADA, therefore, would lose their right (1) to a legal forum to challenge job exclusions which are, in fact, based on the underlying impairment and (2) to request a reasonable accommodation under the Act.

ARGUMENT

I. INTRODUCTION

The Amici states are submitting this brief on the first issue before the Court which concerns the standard by which a

determination of "disability" is made under the first prong of its statutory definition. See 42 U.S.C. §12102(2)(A) (a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"). Specifically, the question is whether the "impairment" should be evaluated without considering the ameliorative effects of medication, prosthetic devices or other forms of assistance as required under an Equal Employment Opportunity Commission ("EEOC") Interpretive Guidance. See 29 C.F.R. Part 1630, App. §§1630.2(h) and 1630.2(j) (whether an individual has an "impairment" and whether that impairment "substantially limits a major life activity" should be made "on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices"). Or alternatively, as the Tenth Circuit has held in this case, that ameliorative measures should be considered when making the threshold determination of whether a person suffers from a disability.¹

¹ The amici states believe that the First Circuit conducted a particularly thorough and persuasive analysis of this issue in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857 (1st Cir. 1998), when it held that the EEOC Interpretive Guidance setting forth the "no mitigation measures" rule was a reasonable interpretation of the ADA. The court determined, first, that "the plain language of the ADA is not so clear and unambiguous" on the subject. Therefore, it looked to the legislative history of the Act, from which it concluded that it was "abundantly clear that Congress intended the analysis . . . to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures." *Id.* 136 F.3d at 859. The court

It is the view of the Amici that the EEOC's "no mitigating measures" Interpretive Guidance embodies the correct position. The use of mitigating measures does not eliminate the underlying disability, although it may reduce or control its effects in the short or long term. It is illogical and contrary to the public policy the states seek to promote to disadvantage employees who engage in successful self-help, by denying them the protection of the ADA, while at the same time providing ADA protection for similarly situated employees who do not ameliorate their underlying medical conditions.

For this reason, and others articulated below, this Brief of Amici is submitted.²

also took into consideration what it concluded were the broad remedial goals of Congress in enacting the Act. *Id.*, 136 F.3d at 861.

The majority of circuit courts that have considered this issue have reached the same result. See *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995). But see *Sutton v. United AirLines*, 130 F.3d 893 (10th Cir. 1997); *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part).

² Many states interpret provisions of their state disability statutes by looking to federal court interpretations under the ADA. See, e.g., *Arnold* 136 F.3d at n.2 (the First Circuit, when

II. APPLYING THE EEOC'S "NO MITIGATING MEASURES" INTERPRETIVE GUIDANCE FOR DETERMINING WHETHER AN EMPLOYEE SUFFERS FROM A DISABILITY RESULTS IN CONSISTENT APPLICATION OF THE ADA, AS A THRESHOLD MATTER, TO EMPLOYEES WITH SIMILAR UNDERLYING MEDICAL CONDITIONS AND ALSO PROMOTES SOUND PUBLIC POLICY.

Under the Tenth Circuit's decision, which requires that the threshold question of disability be determined only after ameliorative measures are taken into consideration, people with disabilities are penalized for their diligent efforts to reduce the impact of their impairments on major life activities because they lose the protection of the ADA. The fundamental unfairness and deleterious impact of such a rule is demonstrated in *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997).

In that case, the plaintiff suffered from non-insulin dependent

interpreting the Maine Human Rights Act, concluded that because "the ADA has 'provided guidance to Maine courts in interpreting the state statute,'" [citations omitted], determination of ADA claim also resolves state claim); *Latch v. Southeastern Pennsylvania Trans. Auth.*, 984 F. Supp. 317 (E.D.Pa. 1997) (Pennsylvania courts look to the ADA in interpreting state's anti-discrimination statutes). See also *Woods v. Friction Material, Inc.*, 30 F.3d 255, 263 (1st Cir. 1994) (Massachusetts' highest court "may look to the interpretations of analogous federal statutes," [citation omitted], in interpreting state anti-discrimination statutes).

diabetes which, once it was diagnosed, he was able to control through a strict regimen of oral medication, rigorous monitoring of blood sugar levels, diet, exercise and proper rest. *Id.* at 761. In the absence of these mitigating measures, the plaintiff employee testified that his blood sugar level "fluctuated widely," resulting in a personality change that substantially limited his ability to work. *Id.*

The court in *Gilday*, with one judge dissenting, rejected the EEOC Interpretive Guidance. It concluded that while the plaintiff was "impaired" under the ADA, the question of whether the impairment amounted to a disability within the meaning of the ADA must be determined by taking into consideration any mitigating measures the plaintiff undertook to control his impairment. Since the plaintiff, through the strict regimen discussed above, could control his condition, he was not found to be "substantially limited" in the major life activity of working and, therefore, was not disabled under the ADA.

As a result of this ruling, an individual with the same general "impairment" as the plaintiff in *Gilday* -- non-insulin dependent diabetes which results in a personality change that affects the major life activity of working -- who does not adopt self-help measures, would likely be covered by the ADA even though he has been "unable to muster the self-discipline to follow his regimen." *Gilday*, 124 F.3d at 764 n.5 (Moore, J., dissenting). Whereas, the plaintiff in *Gilday*, who independently took the initiative and successfully brought his diabetes under control, would be denied such coverage. Such an approach not only discourages self-help, but also results in inconsistent application of the ADA -- as a threshold coverage matter -- to employees with similar underlying medical conditions.

Thus, in the case before this Court, the Tenth Circuit ruling would render contrary findings of ADA coverage for a plaintiff like Murphy who takes his hypertension medication and has controlled his underlying impairment and a plaintiff who suffers from the same underlying medical condition as Murphy but does not take his medications (either because he refuses or cannot afford them) or does not take them regularly as medically required. While the latter would be protected under the ADA, the former would not.

The First Circuit noted the illogic of this result in another diabetes case, *Arnold*, 136 F.3d at 863 n.7. In that case, the plaintiff suffered from type I insulin-dependent diabetes mellitus which required that he monitor his blood glucose levels throughout the day and give himself injections of insulin two to four times a day, keep constant attention to possible signs of hypoglycemia, and follow a strict diet and exercise regimen to control the disease. By these mitigating measures, the plaintiff was able to control the disease. *Id.* The First Circuit commented as follows:

That a person with a disability is able to use medical knowledge or technology to overcome many of the effects of his illness (in *Arnold's* case, by a continuing regimen of medicine, proper eating habits, and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination based on his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes

under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self-help.

Id. See also Bragdon v. Abbott, 524 U.S. ___, 118 S. Ct. 2196, 2206 (1998) (“[T]he disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable”); *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (“Individuals who need wheelchairs, artificial limbs, hearing aids and other prosthetic devices clearly have impairments that may substantially limit their major life activities. Neither as a matter of law nor of common sense would we say that they are not impaired or disabled because their prosthetic device happens to be exceptionally good.”).

Also, under the Tenth Circuit’s decision, an employee without insurance, who cannot afford treatment for an underlying medical condition, would be protected in the hiring process under the ADA. Once he was hired, however, and was insured under a company’s health plan and able to obtain treatment, he would no longer be considered “disabled” and would lose the protections of the ADA. Therefore, he could be fired on the basis of his disability without the ability to resort to the protections of the ADA. This interpretation of the ADA “would be inconsistent with the Act’s broad remedial purposes.” *Arnold*, 136 F.3d at 862. *See also Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997).

The concern that applying the EEOC Interpretive Guidance (which requires that the threshold question of “disability” be determined without regard to mitigating measures) would result in coverage under the ADA of a larger number of Americans, is unpersuasive in light of clear Congressional intent. As the First Circuit noted, that is what Congress intended:

The very first finding Congress listed in the preamble to the Act is that “some 43,000,000 million Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.” 42 U.S.C. §12101(a)(1). It thus appears that Congress not only considered but actually intended that the ADA’s protections sweep broadly, covering a significant portion of the American populace.

Arnold, 136 F.3d. at 862.

III. THE TENTH CIRCUIT’S DECISION CREATES A CONUNDRUM FOR EMPLOYEES WHO ARE BARRED FROM JOBS BECAUSE OF THEIR UNDERLYING IMPAIRMENT, EVALUATED WITHOUT REFERENCE TO MITIGATING MEASURES, AND YET ARE UNABLE TO CHALLENGE THE LEGAL BASIS OF THE DISQUALIFICATION BECAUSE THEY ARE NOT DEEMED DISABLED UNDER THE ADA.

The decision of the Tenth Circuit in *Murphy* highlights the dilemma faced by employees whose disabilities are evaluated in

a mitigated state. The petitioner job applicant in *Murphy* was automatically disqualified from the position of mechanic at United Parcel Service, Inc. ("UPS") because he suffered from severe hypertension and failed to meet a Department of Transportation ("DOT") blood pressure standard. Therefore, he could not be qualified to operate a commercial motor vehicle. He was disqualified despite the fact that he had worked as a mechanic for Ryder Truck Rental for the past 22 years and was able to perform the job adequately.

Thus, the job applicant was barred by a DOT standard from the mechanic's job because of his underlying impairment of severe hypertension, which is evaluated in its unmitigated state. However, the Tenth Circuit concluded that Murphy was not "disabled" under the ADA -- a determination it made after considering the mitigating measures Murphy undertook, which effectively controlled the underlying impairment. As a disabled person, Murphy would have been able to litigate the legality of the DOT standard under the ADA (and whether it was properly interpreted and applied by his employer).³ Since he is not considered disabled, however, his employer's decision is insulated from review.

This is precisely the predicament the First Circuit in *Arnold*, 136 F.3d at 862, sought to avoid by applying the EEOC's

³ Apparently, there is some question as to whether the DOT regulation mandated disqualification of applicants with blood pressure in excess of 160/90 (since this standard is based in a DOT publication) or whether UPS's reliance on this regulation was misplaced and the company was in fact imposing its own requirement on applicants.

Interpretive Guidance to the threshold question of disability. The First Circuit stated:

Arnold's diabetes makes him just the type of person the ADA was designed to protect. He would have been hired by UPS but for his inability to get a commercial vehicle license, which was prevented only because he had diabetes (the underlying medical condition, without taking into account ameliorative treatments). But Arnold alleges that, with treatment, he can perform the job despite his impairment if UPS will reasonably accommodate him. This would ordinarily be a factual question on the merits for the court to determine. Yet, under UPS' and the district court's interpretation of the ADA, a person in this archetypical situation is not protected from discrimination by the ADA because he is not disabled and hence not even a proper plaintiff under the Act. According to UPS, in such circumstances, the trier of fact never gets to the merits of the alleged discrimination, or the "qualified individual" requirement, or of reasonable accommodation.

Id. at 862.

Under the Tenth Circuit's decision, employees who are barred from jobs for failure to meet impairment-based company policies, guidances or regulations have no legal recourse for challenging the basis of those policies, guidances or regulations. Permitting employees the opportunity to challenge the assumptions upon which their disqualifications are based is consistent with Congress's broad remedial goals in enacting the

⁴ The two plaintiff job applicants in the *Sutton* case, No. 97-1943, which is also before this Court, were automatically disqualified from positions as pilots for a major global air carrier because of a company policy that required applicants to have uncorrected vision of 20/100 or better—despite the fact that the Federal Aviation Agency had awarded both applicants first class medical certificates under which they had long been employees as commercial pilots for commuter airlines. As in *Murphy*, their underlying impairment was evaluated without reference to mitigating measures and their legal blindness automatically disqualified them under a company policy from the pilot position.

While vision cases may present a different standard of analysis since vision is easily correctable with eyeglasses or contacts lenses, *see Arnold*, 136 F.3d at 866 n.10, including such plaintiffs within the scope of the ADA, by evaluating the vision impairment in an unmitigated state, will at least permit an employee the opportunity to test the legitimacy of the company policy under the ADA. If the *Suttons* were deemed disabled in their unmitigated state, their employer could still assert that: (1) they are unable to perform an essential function of the job with or without a reasonable accommodation; (2) any accommodation requested would create an undue hardship; or (3) public safety justified the blanket disqualification. 42 U.S.C. §§12111 and 12113. *See also Arnold*, 136 F.3d at 861.

IV. PROTECTION UNDER THE ADA IS ESSENTIAL FOR EMPLOYEES WITH UNDERLYING IMPAIRMENTS, EVEN WHEN THE IMPAIRMENT IS PARTLY OR FULLY CONTROLLED BY MITIGATING MEASURES, SO THAT SUCH EMPLOYEES ARE ENTITLED TO A REASONABLE ACCOMMODATION SHOULD THE NEED ARISE.

Another anomalous result that flows from the Tenth Circuit decision is that people who would otherwise be covered by the ADA for an underlying impairment, but for their ameliorative efforts, are not entitled to even the most minor accommodation. The dissent in *Gilday*, 124 F.3d at 764 (Moore, J. dissenting), provided an example which highlights this problem. It noted that a person with a heart condition who ameliorates the condition by obtaining a pacemaker will be refused protection under the ADA because the mitigation measure successfully controlled the underlying condition. That person, therefore, will not be entitled to any reasonable accommodation -- even one as simple as moving a desk away from a microwave oven to avoid disrupting the medical device.

There are countless examples of the kinds of accommodations that people with a "controlled" impairment might need. First, "ameliorating" the impairment itself may require absences from work -- for example, to attend doctor's appointments, physical therapy, or to obtain testing. Additionally, the mitigating measures may take up work time where, for

example, an employee must take medications on a prescribed schedule or undergo self-testing of the underlying condition.

Also, a controlled condition may not remain permanently controlled. The *Harris* case demonstrates the dilemma an employee can face in this circumstance. In that case, the plaintiff employee suffered from Graves' disease, an endocrine disorder which affected the thyroid gland. She had been diagnosed with the disease twenty years previously and prescribed medication which controlled the condition -- with one exception. In her third year of employment as a comptroller with the defendant company, Harris experienced a "panic attack" due to an overdose in her medication. The overdose occurred because of a change in the manufacturer of the drug. She was hospitalized for eight days in a psychiatric ward and out on sick leave for approximately two months. *Harris*, 102 F.3d at 518.

While Harris was on sick leave, her employer hired another individual to become comptroller. When she returned to work, Harris was informed that she would need to seek other employment. *Id.* According to papers submitted on summary judgment, the plaintiff's employer stated that he "*felt that the company was put in jeopardy, at a disadvantage due to her type [of] illness.*" *Id.*, 102 F.3d at 523 (italics in original).

The employee filed an ADA claim against her employer which was dismissed by the district court on summary judgment. The district court held that the employee's impairment did not rise to the level of a disability. *Id.*, 102 F.3d at 519. It reached this decision by taking mitigating measures into consideration and concluded that, except for this one instance, the employee's impairment was controlled. Thus, under this approach (which is the same as the Tenth Circuit's), Harris would be barred from

challenging her employer's actions under the ADA, even though they were clearly based on her medical condition. Moreover, the plaintiff would not be allowed to assert that her two month sick leave was a reasonable accommodation of her disability.

The Eleventh Circuit reversed the decision of the district court after applying the EEOC Interpretive Guidance and concluded that Graves' disease (which in its unmedicated state would lead to coma and death) was a disability within the meaning of the ADA, and the employee's legal action could go forward. *Id.*, 102 F.3d at 521.

Thus, symptoms may arise from the ameliorating medications, or when the existing medications cease to be as effective as in the past, and can readily result in inconsistent control of the impairment. "[T]he manifested symptoms of an 'underlying disability may be episodic or temporary in nature while the impairment itself is both chronic and permanent.'" *Harris v. H&W Contracting, Company*, 102 F.3d at 520. For this reason, an employee who has an underlying impairment which in its unmitigated state "substantially limit[s] one or more of the major life activities" of that individual; 42 U.S.C. §12102(2)(A); should be covered as a disabled person under the ADA.⁵

⁵ An employee is entitled to a reasonable accommodation only if deemed to be disabled under the first prong of the ADA definition. See *Gilday*, 124 F.3d at 764 n. 4. (Moore, J. dissenting). Thus, providing ADA coverage under the third prong ("regarded as" disabled) for employees who control their underlying impairments through mitigating measures would be inadequate. An employee who is deemed "regarded as" disabled is not entitled to an accommodation. *Id.*

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the Court reverse the Tenth Circuit decision in this case.

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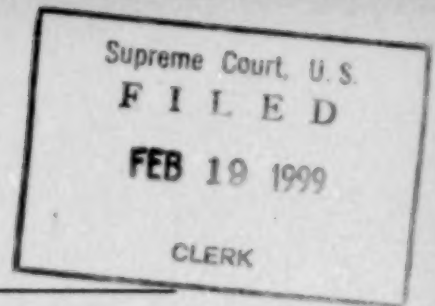
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UNITED PARCEL SERVICE, INC., Respondent

On Writ of Certiorari to the
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BRIEF OF *AMICUS CURIAE*
AMERICAN DIABETES ASSOCIATION
IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*
AMERICAN DIABETES ASSOCIATION
IN SUPPORT OF PETITIONER¹

¹ Pursuant to Rule 37.6, only counsel for *Amicus* American Diabetes Association authored this brief. Only *Amicus* made monetary contribution to the preparation and submission of this brief.

INTRODUCTORY STATEMENT

Whatever definition of "impairment" and "disability" the Court uses in this case will directly and significantly affect the legal rights and remedies of over 16,000,000 Americans with diabetes. This case will determine whether the Americans With Disabilities Act ("ADA") has the broad, remedial purpose intended by Congress and needed by all Americans with disabilities.

For Americans with disabilities, there are certain critical criteria for creating and applying a definition of an "impairment" which qualifies as a "disability" to be protected by the ADA. In understanding such criteria, it is helpful to consider, as Shakespeare so provocatively stated:

What's in a name? That which we
call a rose by any other name would
smell as sweet.²

Or, as the more pithy Gertrude Stein declared:
Rose is a Rose is a Rose is a Rose.³

² Shakespeare, William, *Romeo & Juliet*, Act II, Scene 2, Line 43 (1595).

³ Stein, Gertrude, *Sacred Emily*, The Oxford Book of American Light Verse, Oxford University Press, (1979) p. 286.

For this case, the question asked by millions of Americans living with disabilities is: When is a disability a "disability"? This question focuses on 42 U.S.C. § 12102(2)(A) or so-called "prong one" of the definition of "disability" under the ADA. At issue in this case is whether a disease should be evaluated as a "disability" in its treated or untreated condition.

INTEREST OF AMICUS CURIAE

How this Court handles hypertension in this case will directly influence how other courts handle diabetes regarding eligibility to be a qualifying "disability" under the ADA. Diabetes, like hypertension, is a chronic, non-curable disease for which the risks and complications of treatment are as potentially disabling as the risks and complications of the disease.⁴

The American Diabetes Association ("Association") is the nation's largest, oldest, most prominent, non-profit, voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all

⁴ Appendix to Petition for a Writ of Certiorari ("Pet.App."), pp. 13a & 16a.

people affected by diabetes.

The Association is made up of over 375,000 general members, over 16,000 health professional members, and over 3,000,000 contributors. The Association creates and maintains the most authoritative and widely-followed clinical practice recommendations, guidelines and standards for the treatment of diabetes.⁵ The Association is responsible for the most authoritative and comprehensive publications concerning the treatment of diabetes and developments in diabetes research.⁶

Among the Association's principal concerns is the fair treatment of individuals with diabetes in employment situations. The Association advocates the following policy:

Diabetes as such should not be a cause of

5 American Diabetes Association Position Statement: Standards of Medical Care for Patients with Diabetes Mellitus, *Diabetes Care* 22:S32 (1999).

6 The Association publishes five professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); (2) *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); (4) *Diabetes Reviews* (invited reviews on selected topics for research-oriented health professionals); and, (5) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

discriminating against any person in employment. People with diabetes should be individually considered for employment, weighing such factors as the requirement or hazards of the specific job, and the individual's medical condition and treatment regimen (diet, oral hypoglycemic agents and insulin). Any person with diabetes, whether insulin-dependent or non-insulin-dependent, should be eligible for any employment for which he or she is otherwise qualified.⁷

Consistent with this policy, the Association has participated as *amicus curiae* in cases in the U. S. Supreme Court, many Circuit Courts of Appeal and a number of District Courts.

Presently, there are over 16,000,000 Americans with diabetes, including about 4,000,000 individuals who take insulin to treat their diabetes.⁸ Americans with diabetes, whether or not they take insulin, face serious health risks and complications including heart disease, stroke,

7 American Diabetes Association Employment Policy Statement (1984).

8 *Diabetes in America* (2d Ed.), National Institutes of Health (NIH Publication No. 95-1468) (1995), "Summary," Ch. 1, pg. 1.

blindness, kidney disease, nerve disease, amputation and difficult to control infection.⁹ The life-long medical and economic burden for individuals with diabetes is progressive, permanent and enormous. Diabetes is a serious, widespread and expensive national health problem.¹⁰

The Association knows through long experience that employers commonly restrict employment opportunities for individuals with diabetes and, in particular, for those who take insulin to treat their diabetes. Such restrictions are based on prejudices, stereotypes, unfounded fears and misinformation concerning diabetes and insulin in the workplace.¹¹ The Association is an advocate for employees and a resource of information for employers to understand that individuals with diabetes, whether or not they take insulin,

9 American Diabetes Association Position Statement: Standards of Medical Care for Patients with Diabetes Mellitus, *Diabetes Care* 22:S32 (1999).

10 In 1979, \$77.7 billion, i.e., 8% of all expenditures for health services in U.S., or \$10,071 per capita, compared with \$2,669 for individuals without diabetes. *Economic Consequences of Diabetes Mellitus in the U.S. in 1997*, American Diabetes Association (1998) pp. 9-12.

11 American Diabetes Association Position Statement: Hypoglycemia and Employment/Licensure, *Diabetes Care* 22:S103 (1999).

can be qualified, productive and safe workers in a wide range of employment situations for a broad spectrum of jobs. Indeed, employees with diabetes are often superior workers because of their appreciation, awareness and concern about safety in the workplace.

It is from this context that this *amicus* urges the Court in this case to create and apply a definition for "impairment" which is consistent with the broad, remedial purpose of the ADA. Americans living with disabilities are entitled to full and complete employment opportunities and to receive every reasonable opportunity to be productive, contributing and participating citizens. The definition of "impairment" fashioned in this case will have a significant impact on the 16,000,000 Americans with diabetes represented by the Association.

Additionally, this case involves an "impairment" (i.e. hypertension) which is similar to diabetes. Both diseases are not curable and are treated with medications which cause new and different medical problems. For both diseases treatment focuses on the symptoms of the underlying diseases which are physiological and metabolic in nature. The definition of "impairment" used in this case for hypertension will be used by other courts to determine if diabetes is a

qualifying "disability" under the ADA.

BACKGROUND ABOUT DIABETES¹²

Diabetes treated with insulin is similar to the hypertension afflicting Vaughn Murphy in this case. A brief, basic primer about diabetes as a non-curable, progressive disease will help frame the factual considerations necessary for an appropriate definition of "impairment" under the ADA.

Diabetes is a chronic disease involving the uncontrolled fluctuation of an individual's blood sugar level. Diabetes is physiologically caused by either the failure of the beta cells of the pancreas to produce enough insulin for normal carbohydrate, protein and fat metabolism or the failure of the body to effectively utilize the insulin that is produced.

Insulin is **not** a cure for diabetes but rather only a tool to help regulate an individual's blood sugar level. Insulin is a hormone that serves to transport sugar from the bloodstream into the

¹² See generally: *Bombrys v. City of Toledo*, 849 F.Supp 1210, 1213-1214 (N.D. Ohio 1993) and Bayler, *Dulling A Needle: Analyzing Federal Employment Restrictions on People With Insulin-Dependent Diabetes*, 67 Ind. L.J. 1067, 1068-1074 (1992).

cells of the body where it is metabolized. Without insulin the sugar stays in the bloodstream where the kidneys attempt to eliminate it through increased urine production. If this increased urine production is not slowed by insulin, an individual with diabetes will suffer many disabling symptoms. However, too much insulin causes too much sugar to cross the cell membranes resulting in abnormally low blood sugar levels from which an individual will suffer many new and different disabling symptoms.

Untreated diabetes will cause high blood sugar (hyperglycemia) whereas diabetes treated with too much insulin will result in low blood sugar (hypoglycemia). The goal of treatment is to try to balance the blood sugar level within a safe range, *i.e.* neither too low (to avoid hypoglycemia) nor too high (to avoid hyperglycemia). Regardless, the blood sugar levels for individuals with diabetes rise and fall day by day, and often hour by hour, as a result of a variety of external circumstances including the use and amount of insulin, use of oral medications, diet, exercise, stress, illness and infection.¹³

Whether treated or untreated individuals

¹³ *Medical Management of Type 1 Diabetes* (3d Ed.), American Diabetes Association (1998), pg. 51 *et. seq.*

with diabetes suffer many serious, progressive health complications which substantially limit many of life's major activities. There is a "high misery index" for an individual with diabetes: that individual has a 15 year shorter life expectancy than someone without diabetes;¹⁴ that individual is 2 to 4 times more likely to get heart disease, 2.5 times more likely to have a stroke, 4 times more likely to become blind, and 20 times more likely to get end-stage renal disease (kidney failure). An individual with diabetes is at a substantial higher risk for difficult to control infections and diabetes is the leading cause of adult blindness and non-traumatic amputations.

For an individual with diabetes who uses insulin (approximately 4,000,000 Americans) failure to take insulin can result in severe, acute medical problems and death in the short term.¹⁵ Insulin is used to help treat the symptoms of diabetes and try to lessen the acute and chronic complications from diabetes. However, the use of insulin creates other medical risks and problems

14 *Diabetes in America, supra*, "Mortality in Insulin-Dependent Diabetes," Ch.10, pp.221, 224-228 & "Summary", Ch.1, pg.4.

15 American Diabetes Association Position Statement: Insulin Administration, *Diabetes Care* 22:S83 (1999); Medical Management of Type 1 Diabetes, *supra*, pp. 51 & 55.

(i.e. hypoglycemia or insulin reaction) that lead to new and different limitations on many of life's major activities. Low blood sugar (hypoglycemia) leads to a variety of problems and symptoms ranging from tremors, palpitations and sweating through confusion, drowsiness, and mood changes to unresponsiveness, unconsciousness or convulsions.¹⁶

While elevated blood sugar level is of some concern because of long-term side-effects, the real danger is low blood sugar level caused by too much insulin. Hazardous side-effects associated with low blood sugar levels occur more quickly, more frequently and with more suddenness than do the effects of high blood sugar levels.¹⁷

As with many diseases which are disabling, treatment of diabetes with insulin has medical risks that can be more acute and more dangerous than the underlying disease. Diabetes treated with insulin has higher acute health risks while diabetes without insulin has higher chronic health risks, but both have many of the same health risks. Diabetes, whether treated or untreated, is an "impairment" which substantially limits many

16 *Medical Management of Type 1 Diabetes, supra*, pp. 134-138.

17 *Ibid.*

different major life activities.

The dilemma of a treatment which creates new and different health risks and problems is not unique to diabetes. Vaughn Murphy's treatment of his hypertension with medication creates new and different medical problems than those caused by his hypertension alone. The cruel predicament for many diseases which are treated with medication (*e.g.* hypertension and diabetes) is that the treatment, although potentially life-saving, can be more disabling than the untreated disease.

SUMMARY OF ARGUMENT

The Association urges this Court to fashion a definition of "impairment" which fulfills the broad, remedial purpose of the ADA. There are certain guiding criteria which are essential to creating and applying such a definition.

These criteria lead to a definition like that used in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) and in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998). A definition which is inclusive not exclusive, focuses on the disease not its treatment and encourages not discourages treatment. Such a definition must look at a disease in its natural, untreated condition.

ARGUMENT

AN "IMPAIRMENT" MUST BE LOOKED AT IN ITS NATURAL, UNTREATED CONDITION TO DETERMINE WHETHER IT QUALIFIES AS A "DISABILITY" UNDER THE ADA.

To receive the protections of the ADA, an individual must have an "impairment" which qualifies as a "disability." The threshold or entry issue is whether an individual has a qualifying "disability". The ADA is structured so that once an individual has a qualified "impairment" then there are other considerations such as whether that individual is "otherwise qualified" or needs to be "reasonably accommodated" in order to perform a particular job. An individual's ability to function with a disability should not and need not be addressed in the definition of "impairment" but, rather, how that "impairment" will permit or limit an individual to perform in the workplace.

The focus of the Tenth Circuit in this case on the effects of treatment in order to determine whether a disease qualifies as an "impairment" is misplaced, unnecessary and contrary to the remedial purpose of the ADA. Rather, in answering this threshold question this Court

should look at only the natural, untreated condition of the disease.

Both the First Circuit in *Arnold v. United Parcel Service, supra*, and the Ninth Circuit in *Kirkingburg v. Albertson's, Inc., supra*, look at the disease and not at the treatment to evaluate whether that disease qualifies as an "impairment" under the ADA. This approach is consistent with the clear congressional intent behind the ADA, the actual language of the ADA and the interpretation and application of the ADA by this Court in *Bragdon v. Abbott*, 524 U.S. ____, 118 S.Ct., 2196, 141 L.Ed.2d 540 (1998).

The focal point of this case is on the qualifying definition of "impairment" under a "prong one" definition of a disability. 42 U.S.C. § 12101(2)(A). This argument focuses only on a "prong one" analysis: When does an individual with a chronic, permanent, non-curable disease have an "impairment" that qualifies as a "disability" under the ADA?

A. THE DEFINITION OF "IMPAIRMENT" MUST BE INCLUSIVE TO FULFILL THE BROAD REMEDIAL PURPOSE OF THE ADA.

The narrow and restrictive definition of

"impairment" used by the court below (*i.e.* requiring that a disease be evaluated in its treated condition) creates an artificial choke point at the beginning of the ADA analysis. This means that many of the millions of Americans living with disabilities cannot qualify for ADA protection since the vast majority of those Americans treat their disability. Under this narrow and restrictive approach treatment defines "impairment" and determines legal protection.

The actual language of the ADA and its legislative history make it clear that the ADA was intended to have a broad, remedial purpose. Specifically, its Findings and Purpose show that Congress intended the ADA to impact the lives of more than 43,000,000 Americans to address "a serious and pervasive social problem" which "persists" for which they "often had no legal recourse" thereby making people with disabilities "severely disadvantaged." 42 U.S.C. § 12101(a) (1), (2), (3), (4) & (6). The most powerful Congressional statement about the broad remedial purpose of the ADA is as follows:

Individuals with disabilities are a discreet and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of

political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. 42 U.S.C. § 12101(a)(7).

Congress states that America's goals regarding individuals with disabilities are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Finally, Congressional intent is unambiguous that the ADA was to have a broad remedial scope. The stated purpose of the ADA is

. . . to provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1).

It is "a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 US 332, 336 (1967); *Arnold v. United Parcel Service, Inc.*, *supra*, 861. Given the clear, broad remedial purpose of the ADA, the Tenth Circuit's restrictive and narrow

definition of a qualifying "impairment" is contrary to that purpose.

To fulfill its broad remedial purpose the ADA is structured like a funnel with a broad open entrance to attract a wide variety of disabilities which can then be individually examined to see if they are eligible for ADA protection. The ADA analysis continually narrows as an individual with a particular "impairment" is evaluated for a specific job. The remedial purpose of the ADA is dramatically undermined if the qualifying definition for "impairment" is artificially narrowed.

B. THE DEFINITION OF "IMPAIRMENT" MUST FOCUS ON THE DISEASE AND NOT ON THE TREATMENT OF THAT DISEASE.

For purposes of deciding whether a particular disease qualifies as a "disability" under the ADA, it should not matter how or when that disease is treated. Rather, the impact and effectiveness of treatment for a disease should be examined in deciding whether that individual is "otherwise qualified" and needs "reasonable accommodation" to perform a particular job. In this context, the focus on the effect of treatment is not only appropriate, but necessary.

Congressional intent, the language of the ADA, the opinion of this Court and the interpretation of the EEOC support a definition of "impairment" that looks at a disease in its natural, untreated condition.

Again, Congressional intent is clear that "despite some improvements" "individuals with disabilities" "based on characteristics that are beyond the control of such individuals" need the broad remedial purpose of the ADA to eliminate discrimination. 42 U.S.C. § 12101(a) (2) & (7). These statements show that Congress anticipated that Americans living with disabilities would be evaluated by looking at the natural, untreated condition of that disability.

This Congressional intent is further supported by looking at various statements during the discussions and debates surrounding the passage of the ADA. For example, the House and Senate Committee reports state that a disability "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less

than substantial limitation."¹⁸ Both Houses indicated that individuals with impairments are considered to have an actual disability "even if the effects of the impairment are controlled by medication."¹⁹

The Tenth Circuit's decision in this case predates this Court's opinion in *Bragdon v. Abbott*, *supra*. Therefore the Tenth Circuit was not able to look to this Court for guidance in its interpretation of the ADA. In *Bragdon*, this Court concluded that non-symptomatic HIV infection is a "disability" under the ADA. In so deciding, the Court reasoned that a disease should be evaluated in its natural, untreated condition. In discussing whether medication therapy could lower the risk of perinatal transmission of the HIV infection during pregnancy and thereby substantially limit a major life activity, the Court stated:

The act addresses substantial limitations on major life activities, **not utter inabilities**. Conception and childbirth are not

18 H.R. Rep. No. 101-485, Pt. III, at 28 (1989), reprinted in 1990 U.S.C.C.A.N. 445, 451 (House Judiciary Report); H.R. Rep. No. 101-485, Pt. II, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303-334 ("House Labor Report"); S. Rep. No. 101-116, at 23 (1989) ("Senate Report").

19 House Labor report at 52; Senate Report at 22.

impossible for an HIV victim but, without doubt are dangerous to the public health.

... In the end, the disability definition does **not turn on personal choice**. When significant limitations result from the impairment, **the definition is met even if the difficulties are not insurmountable**.

(Emphasis added.) *Bragdon v. Abbott*, *supra*, 2206.

These statements show that the Court understands the realities of having a non-curable, permanent condition regardless of any treatment which may lessen only certain consequences of the disease. If non-symptomatic HIV infection is an "impairment" under the ADA, then certainly hypertension and diabetes are qualified "impairments" under the ADA.

Finally, the EEOC has interpreted the ADA to require evaluation of an "impairment" in its untreated condition to determine whether it qualifies as a "disability under the ADA."²⁰

Treatment of a particular medical condition is not the same as cure. Treatment of diabetes with insulin and treatment of

20 EEOC Interpretive Guidance, 29 C.F.R. Part 1630, App. §§ 1630.2(h) and 1630.2(j).

hypertension with medication²¹ do not cure those diseases but, rather, only treats certain symptoms and hopefully lessens or delays the onset of complications. Frequently, treatment with medication for a particular disease becomes more ineffective over time. Frequently, a particular disease breaks through the medication or treatment requiring dramatic changes in treatment. Virtually all diseases treated with medication face the inexorable problem that over time the medication becomes less effective for a variety of different reasons.

Additionally, the treatment of diseases such as diabetes or hypertension is extremely variable. Not only are all individuals treated in an individualized manner, but the amount and effect of the treatment changes daily and sometimes hourly based on other external factors. This is particularly true for diabetes where external factors such as illness, infection, stress, diet and activity level create a constantly changing situation which requires multiple daily blood tests to monitor. With diabetes, constant vigilance is

21 The treatment of hypertension with medication to reduce blood pressure results in "severe side-effects such [as] stuttering, loss of memory, impotence, lack of sleep and irritability." *Pet.App.* at 16a.

necessary for the reliable, predictable treatment of diabetes with insulin.

Under the Tenth Circuit's definition, someone can have a disability one day yet, because of the variabilities of treatment, not have a disability the next day. One day an employer cannot fire a person who appears sick with a disability, but on another day can fire that same person who appears well but has the same disability.

Another problem with focusing on treatment rather than on the disease is that treatment creates new and different medical complications which cause new and different disabling problems. For both hypertension and diabetes, the individual is always between "the rock and the hard spot" concerning whether the problems of the underlying disease are better or worse than the problems of the treatment. An individual with hypertension or diabetes has a real world disability whether or not they treat.

For Vaughn Murphy, the Tenth Circuit's evaluation of his hypertension in its treated condition ignores the disabling effect and complications created by that treatment. Vaughn Murphy is "disabled" whether or not he treats his hypertension.

C. THE DEFINITION OF "IMPAIRMENT" MUST ALLOW AN INDIVIDUAL TO PURSUE TREATMENT WITHOUT SACRIFICING LEGAL RIGHTS OR REMEDIES.

As the Court pointed out in *Arnold v. United Parcel Service, Inc.*, *supra*, it is an unintended "anomaly" for an individual to have to choose between medical treatment and legal protection. This puts an individual with an "impairment" between *Scylla* and *Charybdis*, i.e. treat and risk no legal protection or don't treat but have full legal protection. This is a cruel choice for an individual living with a disability. This is contrary to the Congressional Findings and Purpose because the ADA was designed and intended to provide individuals with "legal recourse" to eliminate discrimination. 42 U.S.C. § 12101(a)(4).

The effect of looking at a disease only in its treated condition means that an individual who tries to take care of himself or herself risks losing legal protection, whereas, if he or she does not try to take care of the disease, legal protection is available. This is not the result intended by Congress. Congress intended individuals living with disabilities to use every reasonable effort to

treat and care for themselves, but still have protection against discrimination. This is why the ADA is structured to handle the effect of treatment when considering the "otherwise qualified" and "reasonable accommodation" issues.

Surely, Congress did not intend individuals to forego efforts to lessen the discomfort and problems of their disease just to qualify for legal protection. Rather, Congress intended individuals with disabilities to have "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8). It is the purpose of the ADA to encourage individuals in every way possible to live well with their disability rather than to discourage or penalize persons for such efforts.

The unintended consequences of the restrictive definition of "impairment" by the Tenth Circuit in this case forces a no-win choice for millions of Americans. The ADA was not created to protect the rights and provide remedies for individuals who are not able to work because they do **not** treat their disability. Affirming the Tenth Circuit will create that result. Effort to treat should be rewarded with and not denied ADA protection.

No individual living with a disability should

ever be discouraged from doing everything possible to live well with that disability. No one should be caught in the "Catch 22" of treating their disability only to lose ADA protection.

CONCLUSION

Under the Tenth Circuit's approach to the ADA an individual with a disability is a double victim - a victim of his disease and a victim of the ADA because he tried to treat his disease. Only if this Court looks at a disease in its natural, untreated condition can an individual with a disease receive the intended protection of the ADA.

This Court should reverse and remand this case.

Respectfully submitted,

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IN THE
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KAREN SUTTON AND KIMBERLY HINTON,
Petitioners,

v.

UNITED AIRLINES, INC.,
Respondent.

VAUGHN L. MURPHY,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

**BRIEF OF AIDS ACTION, *et al*, AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE AMICI CURIAE

The *amici curiae* joining this brief are organizations that represent individuals with disabilities, including individuals with disabilities that are ameliorated or treated with mitigating measures such as medications. The *amici* share a commitment to eradicating the debilitating discrimination faced by persons with disabilities, and to ensuring equality and reasonable accommodation in the workplace and other settings covered by federal disability law. The *amici* have a strong interest in the effective implementation of the Americans with Disabilities Act ("ADA"), and bring a unique understanding of the purpose and role of laws barring disability-based discrimination. A full recitation of their interest appears in the Appendix.

The written consents of the parties to this brief have been lodged with the Clerk pursuant to Rule 37.2.¹

ARGUMENT

In enacting the ADA, Congress found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). Congress further enunciated its sweeping purpose: "to provide a clear and comprehensive national mandate for the

¹ No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amici*. Rule 37.6.

elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

The analysis employed by the U.S. Court of Appeals for the Tenth Circuit in *Sutton*, and affirmed by that Court in *Murphy*, is contrary to this purpose.

I. THE DEFINITION OF DISABILITY UNDER THE ADA IS INTENTIONALLY BROAD TO ACHIEVE THE CIVIL RIGHTS PURPOSES OF THE LAW.

The ADA was intended to cover a broad range of disabilities, and to ensure that persons with disabilities are full and equal members of our society. To achieve this goal, Congress fashioned a statute designed to protect not only those persons who have impairments that give rise to specific physical and mental limitations, but also those who have experienced such limitations in the past or who are regarded as having a disability by others.

Congress recognized that the irrational fears and misperceptions about disability can be as debilitating as the impairments themselves.² Thus, included within the broad class of persons protected by the Act are those who are limited and discriminated against because of the "prejudice, stereotype, or unfounded fear" of others. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

² 136 Cong Rec S 7422, *S7442 (June 6, 1990) (Statement of Sen. Harkin) ("[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce. Even cancer was once thought to be contagious and resulted in discrimination. For people with disabilities, including those with HIV disease and AIDS, the ADA offers promise that they will no longer be shunned and isolated because of the ignorance of others.").

Accordingly, Congress adopted the broad and longstanding definition included in the Rehabilitation Act of 1973, 29 U.S.C. § 794, defining disability as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such impairment.

42 U.S.C. § 12102(2). As this Court noted in *Bragdon v. Abbott*, this definition is drawn "almost verbatim" from the Rehabilitation Act's broad definition. 524 U.S. 624, 118 S. Ct. 2196, 2202 (1998); see also *Arline*, 480 U.S. at 285 ("the definition of 'handicapped individual' is broad"). In so adopting, Congress intended that the ADA's protections cover a wide range of types and levels of disabilities.

II. IN ENACTING THE ADA, CONGRESS ADOPTED THE COVERAGE OF THE REHABILITATION ACT AS A MINIMUM STANDARD.

Congress is presumed to know the state of the law when it passes legislation, and its use of terms which have been previously construed indicates an intent to ratify such interpretations. *Bragdon*, 118 S. Ct. at 2208. Accordingly, this Court should assume that Congress intended to codify the law of Section 504 as it existed in 1990 as the minimum level of coverage under the ADA.³ Indeed, Section 501(a) of the ADA was adopted to ensure

³ In fact, the ADA was enacted to broaden civil rights protections, beyond the scope of Section 504. *Helen L. v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995) (analyzing ADA's legislative history).

that the courts would *not* construe the ADA to afford less protection than Section 504 of the Rehabilitation Act.⁴

A. Section 504 Case Law Protected Individuals With Mitigated Disabilities.

Section 504 case law existing at the time of the ADA's passage extended civil rights protections to numerous groups of persons with disabilities which were either wholly or partially mitigated through treatment and other measures. For example, insulin-controlled diabetes was held to be covered under Section 504 prior to the passage of the ADA.⁵ Similarly, epilepsy and seizure disorders were repeatedly deemed disabilities.⁶ Courts also recognized that diseases such as HIV, even in their

⁴ "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [citation omitted] or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

⁵ *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982); *Davis v. Meese*, 692 F. Supp. 505, 513, 517 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (table) ("Some insulin-dependent diabetics never experience a severe hypoglycemic occurrence, and are able to control their blood sugar levels at nearly normal levels throughout their working careers. . . . [A]n insulin dependent diabetic is clearly a 'handicapped person.'").

⁶ *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (plaintiff with infrequent seizures could be disabled because persons with epilepsy face policies restricting their employment opportunities); *Mantolite v. Bolger*, 767 F.2d 1416, 1420, 1424 (9th Cir. 1985) (person with condition under "complete control" was disabled and potentially entitled to accommodation); *Akers v. Bolton*, 531 F. Supp. 300, 315 (D. Kan. 1981) (Section 504 "doubtless encompasses the class of epileptic school children"); *Drennon v. Philadelphia General Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977) ("That persons with epilepsy are considered handicapped is too self-evident to be contested.").

"asymptomatic" phases, may be disabilities.⁶ Several of these decisions were cited by this Court in *Bragdon* as having correctly construed the definition of disability under Section 504. 118 S. Ct. at 2208.

The pre-ADA courts also held that recovered alcoholics and drug users are protected by Section 504.⁷ Indeed, the issue was considered so well settled that this Court simply assumed that recovered alcoholics are disabled in *Traynor v. Turnage*. 485 U.S. 535, 548-49 (1988). The courts recognized that Congress intended that coverage would enable persons with drug and alcohol addictions to engage in treatment programs.⁸

By incorporating into the ADA virtually the same definition of disability contained in Section 504, Congress adopted and ratified the case law interpreting the "plain language" of that definition.

⁶ *Dor v. Garrett*, 903 F.2d 1455, 1457, 1459 (11th Cir. 1990) *cert. denied*, 484 U.S. 849 (1987) ("[I]t is well established that infection with AIDS constitutes a handicap."); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1527-28, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 383 (C.D. Cal. 1987); *see also Robertson v. Granite City Com. Unit School Dist.* 9, 684 F.Supp. 1002, 1007 (S.D. Ill. 1988).

⁷ *See, e.g., Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985); *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171, 182 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987); *Wallace v. Veterans Administration*, 683 F.Supp. 758, 761 (D. Kan. 1988); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372, 1391 (W.D. Wis. 1987), *aff'd*, 841 F.2d 737, 740 (7th Cir. 1988); *Traynor v. Walters*, 606 F.Supp. 391, 399-400 (S.D.N.Y. 1985) (alcoholic who had been sober 10 years was "handicapped individual").

⁸ *See, e.g., Davis v. Bucher*, 451 F.Supp. 791, 796 (E.D. Pa. 1978); *Burka v. New York City Transit Authority*, 680 F.Supp. 590, 600 (S.D.N.Y. 1988).

B. Section 504 Regulations Confirm a Broad Definition of Disability.

The original Section 504 regulations, promulgated by the Department of Health, Education and Welfare in 1977, further indicate that many disabilities which can be mitigated through treatment are covered. In *Bragdon*, this Court held that "the ADA [must] . . . grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." 118 S. Ct. at 2202 (citing Section 501(a)).⁹

For example, the regulations in place since the time the ADA was enacted define "physical or mental impairment" to include numerous medical conditions which may be controlled or mitigated through treatment, including emotional or psychological disorders. 45 C.F.R. § 84.3(j)(2)(i). Further, the commentary to the regulations provides a non-exclusive list of additional examples, including hearing impairments, epilepsy, multiple sclerosis, cancer, heart disease, diabetes, drug addiction, and alcoholism. 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. Pt. 84, App. A, p. 334 (1998).

Perhaps most tellingly, the commentary notes that federal disability nondiscrimination law should not be limited to "traditional disabilities," nor to "severe disabilities." *Id.* at 352; see also *Arline*, 480 U.S. at 280 n.5 (broad definition not limited to "traditional handicaps"). This same perspective must be brought to the ADA's definition of disability.

⁹ This Court has repeatedly held that such regulations are entitled to special deference because they were developed with the oversight and approval of Congress. *Arline*, 480 U.S. at 279-80.

III. CONGRESS STATED THAT MITIGATING MEASURES ARE NOT TO BE CONSIDERED IN DETERMINATING WHETHER AN INDIVIDUAL IS DISABLED.

The starting point for statutory analysis is the plain language of the statute itself. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). The plain language of the ADA protects an individual with a disability, defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2). However, the statute -- which does not define "impairment," "substantially limits," or "major life activities" -- does not specify whether a court should consider medications, prosthetic devices, or other treatments in determining whether a person has a substantially limiting impairment.

Where the text of a statute is not unambiguously clear, this Court has looked to the statute's legislative history for guidance. *United States v. Dickerson*, 310 U.S. 554, 562 (1940). In enacting the ADA, the Congress issued extensive reports detailing its intent in adopting the Act's broad definition of "disability." On numerous occasions, Congress explicitly stated that mitigating measures are not to be considered in determining whether an individual has a disability covered by the Act:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as

epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Comm. on Educ. & Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 52 (1990); *see also* House Comm. on the Judiciary, H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 28-29 (1990) ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."); Senate Comm. on Labor & Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989).

A. The Instruction of Congress to Disregard Mitigating Measures Is Consistent with its Intent to Protect Persons with Treatable Disabilities.

Although the ADA requires an individualized analysis to determine whether a particular impairment constitutes a covered disability, Congress expressly cited in the legislative history a number of exemplary conditions that could be protected under the Act's definition, including epilepsy, diabetes, mental health conditions, cancer, HIV/AIDS, alcoholism, and heart disease.¹⁰

¹⁰ S. Rep. No. 116 at 8, 22-24, 27, 31, 39-40, 62 (1989); H.R. Rep. No. 485(II) at 51-53, 57, 62, 72, 75, 79-80, 104; H.R. Rep. No. 485(III) at 28-29, 33, 42, 44-46, 50 (1990); *see also* 136 Cong Rec E 1913, *E1914 (June 13, 1990) (Statement of Rep. Hoyer) ("Examples of impairments that substantially limit major life activities are visual or hearing impairments, mobility impairments, cerebral palsy, epilepsy, HIV infection, mental retardation, chronic schizophrenia, or heart disease.").

For example, epilepsy is cited throughout the legislative history as an example of a covered disability.¹¹ The use of medication to mitigate the symptoms of epilepsy is expressly noted in the reports. H.R. Rep. No. 485(II) at 52; H.R. Rep. No. 485(III) at 28, 29. Indeed, in discussing the importance of protecting individuals with epilepsy, Representative Tony Coelho noted that "today the overwhelming majority of people with epilepsy have their physical conditions under control through medication." 135 Cong. Rec. E 1575 (May 9, 1989).¹²

Similarly, diabetes, although frequently controlled with insulin, is cited as a covered disability.¹³ Psychiatric conditions are also repeatedly cited.¹⁴ As with epilepsy and diabetes, mental illnesses are often controlled by medications.¹⁵

¹¹ S. Rep. No. 116 at 22, 31, 39, 62; H.R. Rep. No. 485(II) at 51, 52, 62, 72, 79, 80, 104; H.R. Rep. No. 485(III) at 28, 29, 33, 42, 50.

¹² *See also* 136 Cong Rec H 2421, *H2427 (May 17, 1990) (Statement of Rep. Hoyer) ("As we all know, Tony [Coelho]'s original career plans were stalled because of discrimination against persons with epilepsy. In the end, this was a blessing to the Nation and this House, for he might not have ended up here. But no one in this Nation has proven more than Tony Coelho that someone with a disability can be one of the most able people our Nation has ever seen.").

¹³ S. Rep. No. 116 at 22, 39; H.R. Rep. No. 485(II) at 51, 52, 72; H.R. Rep. No. 485(III) at 28, 42.

¹⁴ H.R. Rep. No. 485(II) at 51, 57, 72, 79, 104; H.R. Rep. No. 485(III) at 28, 42, 45, 46; S. Rep. No. 116 at 22, 27, 39, 62 (1989).

¹⁵ In defending the Act's protection of qualified individuals with mental health disabilities, Senator Harkin noted the role of medications: "I am sure there are plenty of manic-depressives in this country -- I know some. I have met some who are completely controlled under doctors' orders as long as they are on prescription drugs." 135 Cong Rec S 10765, *S10765, 10766 (Sept. 7, 1989).

In addition, HIV/AIDS is referenced in the reports.¹⁶ As extensive floor discussion made clear, asymptomatic HIV was intended to be a covered disability.¹⁷ The critical role of medications was noted.¹⁸

To consider mitigating measures in determining coverage under the Act would be directly contrary to the intent of Congress to protect persons with a wide range of episodic and treatable conditions.

B. Congress Expressed a Keen Interest in Promoting Treatment for Individuals with Disabilities.

The language of a statute is to be interpreted in light of the purposes Congress sought to serve. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983). Congress repeatedly expressed an interest in promoting health, treatment and

¹⁶ S. Rep. No. 116 at 19, 22 ("All persons with symptomatic or asymptomatic HIV infection should be clearly included," quoting Presidential Commission on the HIV Epidemic); H.R. Rep. No. 485(II) at 48, 51, 79; H.R. Rep. No. 485(III) at 28.

¹⁷ See 135 Cong Rec S 10765, *10800 (Sept. 7, 1989) (Statement of Sen. Simon) ("[T]his bill will extend protection to people with AIDS and people infected with HIV, symptomatic and asymptomatic."); 136 Cong Rec S 9684, *S9696 (July 13, 1990) (Statement of Sen. Kennedy) ("People with HIV disease are individuals who have any condition along the full spectrum of HIV infection -- asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. *These individuals are covered under the first prong of the definition of disability in the ADA . . .*") (emphasis added).

¹⁸ 135 Cong Rec S 10765, *S10768 (Sept. 7, 1989) (Statement of Sen. Kennedy) ("The most recent Public Health Service report that was released 2 weeks ago, has demonstrated that AZT has had a positive impact on those that have tested positive but do not have the disease. . . . [W]e have pointed out very clearly, if you are asymptomatic and HIV positive, you are protected . . .").

recovery for individuals with disabilities through the implementation of the Act. Accordingly, the legislative history notes the importance of reasonable accommodations designed to serve this purpose.

For example, key committee reports note the importance of scheduling modifications benefiting individuals with chronic conditions:

Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts.

H.R. Rep. No. 485(II) at 62-63; S. Rep. No. 116 at 31.

Similarly, sponsors of the Act noted the importance of anti-discrimination provisions and workplace accommodations enabling individuals with asymptomatic HIV to benefit from medications and other treatments:

The reasonable accommodation provision of the bill will be particularly important in ensuring that people with HIV disease have the right to flexible work schedules and to time off to accommodate their treatment needs or their various disease-related conditions.¹⁹

¹⁹ 136 Cong Rec H 4614, *H4623, *H4626 (July 12, 1990) (Statements of Rep. Owens and Rep. Waxman); see also 136 Cong Rec S 9684, *S9696 (July 13, 1990) (Statement of Sen. Kennedy); 136 Cong Rec H 2421, *H2442 (May 17, 1990) (Statement of Rep. Weiss); 136 Cong Rec H 2599, *H2626 (May 22, 1990) (Statement of Rep.

Congress surely did not intend such modifications to be inversely tied to the success of an individual's treatment program.

Similarly, in lengthy floor debates on the Act's coverage of individuals with alcohol or drug addiction, several senators stressed the benefits of access to recovery programs, and expressly noted that the Act's protections extend to assist individuals in treatment:

The act's protections extend to rehabilitated individuals who no longer use illegal drugs, but who continue to participate in treatment programs -- such as a methadone maintenance treatment program -- or continue to receive after-care counseling or participate in self-help groups. This reflects our recognition that these activities can be crucial to many individuals' ability to successfully sustain their recovery.²⁰

In the words of Senator Moynihan, "To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax." 135 Cong Rec S 10765, *S10795.

Providing the health-promoting accommodations expressly cited by Congress would be meaningless were they were revoked once treatment became effective in controlling symptoms. Eliminating access to such accommodations "would indeed be a cruel hoax."

McDermott) (all noting importance of workplace accommodations to people with HIV).

²⁰ 135 Cong Rec S 10765, *S10774 (Sept. 7, 1989) (Statement of Sen. Kennedy).

IV. THE FEDERAL AGENCIES CHARGED WITH ENFORCING THE ADA HAVE STATED THAT MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY.

This Court has looked to administrative guidance issued by the Equal Employment Opportunity Commission (EEOC) and by the Department of Justice in construing the ADA. See, e.g., *Bragdon v. Abbott*, 118 S. Ct. at 2208-09. While such guidance are not controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986) (citations omitted), and are "entitled to deference." *Bragdon*, 118 S. Ct. at 2209.

As the federal agency charged with implementing Title I of the ADA, the EEOC has repeatedly stated that mitigating measures are not to be considered in evaluating whether an individual has a disability covered by the Act:

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. Pt. 1630, App., § 1630.2(j).

[T]he extent to which the impairment limits the individual's major life activities should be assessed without regard to the availability of mitigating measures. Thus, an individual who has experienced a significant loss of hearing is substantially limited in his/her ability to hear, even if the use of a

hearing aid would improve the individual's level of hearing. Similarly, individuals with impairments (such as epilepsy or diabetes) that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairments. Accordingly, an individual who received dialysis treatments for polycystic kidney disease had a substantially limiting impairment, even though the disease was adequately treated through dialysis.

EEOC Compliance Manual, EEOC Order No. 915.002, Section 902, *Definition of the Term "Disability,"* pp. 35-36 (Mar. 14, 1995) (citations omitted).²¹ The Department of Justice, which is responsible for implementing Titles II and III of the ADA, has followed this view.²² The Court should defer to these agencies.

V. THE MAJORITY OF FEDERAL COURTS HAVE DISREGARDED MITIGATING MEASURES IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY.

Most federal Courts of Appeals have followed the rule stated in the legislative history and by the EEOC that mitigating measures should not be considered in determining whether an individual has a substantially limiting impairment. For example, the First and Seventh Circuits have held that individuals with diabetes controlled by insulin may be disabled under the Act. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 (1st Cir. 1998)

²¹ See also EEOC Order No. 915.002, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* 6-7 (Mar. 25, 1997).

²² 28 C.F.R. pt. 35 app. A § 35.104 (Definitions).

(plaintiff's diabetes, in its untreated state, constituted disability); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 630 (7th Cir. 1998) (truck driver with insulin-dependent diabetes raised question of fact: "That he feels 'perfectly healthy' when he is taking insulin is utterly irrelevant to the assessment of disability for the purposes of the ADA.").²³ The First Circuit has also upheld a jury verdict in favor of a plaintiff with treated depression. *Criado v. I.B.M. Corp.*, 145 F.3d 437, 442-43 (1st Cir. 1998) ("That her depression had been adequately treated through therapy in the past and was expected to be adequately treated through therapy and medication in the future does not establish that she does not have a disability.").

Similarly, the Third Circuit found that a maintenance supervisor with epilepsy controlled by medication raised a question of fact as to whether he was disabled. *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3rd Cir. 1997); see also *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3rd Cir. 1998) (disregarding reasonable accommodations in finding sufficient evidence of substantial limitation in working). The Fifth Circuit found that an accountant with Adult Stills disease should be evaluated in his unmedicated state. *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 (5th Cir. 1998); cf. *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993) (citing guidance

²³ See also *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (citing EEOC guidelines but finding insufficient evidence of substantially limiting impairment under that standard); *Coleman v. Keebler Company*, 997 F. Supp. 1102 (N.D. Ind. 1998) (same); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746 (N.D. Ill. 1998) (insulin-dependent diabetes was disability); *Krocka v. Riegler*, 958 F. Supp. 1333, 1340-41 (N.D. Ill. 1997) (treated depression was disability); *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829, 834-35 (N.D. Ill. 1998) (uncorrected 20/400 vision constituted disability).

on insulin-dependent diabetes but finding plaintiff unqualified); *but see*, *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 n.3 (5th Cir. 1996) (implying disagreement with EEOC in *dicta*).

The Eighth Circuit has followed the rule. *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 693 (1998) (police officer with monocular vision evaluated without regard to subconscious adjustments made by brain).²⁴ The Eleventh Circuit ruled that a comptroller with Graves Disease controlled by medication created a question of fact as to whether she had a disability. *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996). The Ninth Circuit has acknowledged the rule. *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1349 (1997) (citing mitigating measures guidance but finding no evidence that plaintiff's work activities were a form of treatment).²⁵

Further, district courts in the Fourth, Tenth and D.C. Circuits have disregarded mitigating measures in evaluating whether an individual has a disability.²⁶

²⁴ See also *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (applicant with vision impairment created issue of fact as to disability); *Smith v. Horton Industries, Inc.*, 17 F. Supp. 2d 1094 (D.S.D. 1998) (excluding consideration of prosthetic in deeming individual with one arm disabled).

²⁵ See also *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1221 (9th Cir. 1998) (subconscious adjustments to monocular vision did not render applicant nondisabled); *Coleman v. Southern Pacific Transp. Co.*, 997 F. Supp. 1197, 1201 (D. Ariz. 1998) (excluding innate mitigating measures of the brain in finding monocular vision to be disability).

²⁶ *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 909 (E.D. Pa. 1997) (myopic applicants created question of fact); *Sarsycki v. U.P.S.*, 862 F. Supp. 336 (W.D. Okla. 1994) (judgment for plaintiff with controlled diabetes); *Fallacaro v. Richardson*, 965 F. Supp. 87 (D. D.C.

A minority of courts have rejected the Congressional and agency rule, contending that ignoring the effects of mitigating measures is inconsistent with the statutory language requiring a "substantial limitation" of a major life activity.²⁷ These courts disregard the unambiguous legislative history as to the meaning of this phrase, as well as significant Rehabilitation Act case law then in effect which interpreted similar language to protect individuals with treatable disabilities. Further, these courts incorrectly read the rule as eliminating the case-by-case analysis required by the Act. To the contrary, individuals must still demonstrate that their impairments, without mitigation, substantially limit one or more major life activities. Finally, these courts fail to consider the underlying purposes of the Act, which are inconsistent with rules that circumscribe protections against discrimination, or that deter access to effective treatment.

VI. EXCLUDING INDIVIDUALS WITH TREATABLE DISABILITIES FROM THE COVERAGE OF THE ADA IS CONTRARY TO ITS FUNDAMENTAL PURPOSES.

As a broad, remedial statute, the ADA must be liberally construed to effectuate its purposes. *Heilweil v. Mt.*

1997) (applicant who was legally blind without corrective lenses was disabled).

²⁷ *Wilking v. County of Ramsey*, 983 F. Supp. 848, 854 (D. Minn. 1997) *aff'd*, 153 F.3d 869 (8th Cir. 1998); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997); *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 (D. Kan. 1996); *Shulter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994); see also *Gilday v. Mecosta Cty.*, 124 F.3d 760 (6th Cir. 1997), at 767 (Kennedy, J., concurring in part and dissenting in part), at 768 (Guy, Jr., J., concurring in part and dissenting in part); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080 (E.D. Okla. 1997).

Sinai Hosp., 32 F.3d 718, 722 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (describing "familiar canon of statutory construction"). The constructions employed by the courts below are contrary to the Act's remedial aims.

A. Excluding Individuals with Treatable Disabilities is Contrary to the Statute's Focus on Individuals Who are Able to Work Despite Their Disabilities.

As the Court noted in *Arline*, the ADA's broad definition of disability is appropriate, because "only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." 480 U.S. at 285 (emphasis in original).

In the context of employment discrimination, the thrust of [the Act's] purpose is essentially to protect individuals who have an underlying medical condition or other limiting impairment, but who *are* in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer.

Arnold v. United Parcel Service, Inc., 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original). In other words, it is those disabled individuals who are receiving stabilizing treatment who are more likely to be "qualified" for employment, and fall squarely among the groups protected by the Act. Accordingly, the *Arnold* court concluded that "Arnold's diabetes makes him just the type of person the ADA was designed to protect. . . . [W]ith treatment, he can perform the job despite his impairment if UPS will reasonably accommodate him." *Id.* at 862; *see also Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1134

(11th Cir. 1996), *amend. on reh.* in part by 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2453 (U.S. 1997) ("[I]t is possible that both are true: she still suffered from these symptoms and they limited major life activities, but she was able to control them sufficiently with the help of medication to perform at work . . .").

On the floor of the Senate, sponsor Senator Harkin reiterated the focus on whether an individual is qualified. Rather than making an individual "nondisabled" and unprotected, medication promotes protection by enabling an individual to meet standards.

[If the disability] would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive or whatever it might be is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job, . . . the employee then would be able to go to the EEOC and file a complaint . . .

135 Cong Rec S 10765, *S10766 (Sept. 7, 1989). Senator Domenici made precisely the same point:

[T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certainly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Id. at *S10779 (emphasis added).

Under the analysis adopted below, many individuals with treatable and episodic disabilities who are qualified inevitably find themselves unprotected by the Act. This result must be rejected as incompatible with the broad scope and purposes of the Act.

B. Excluding Individuals with Treatable Disabilities Overlooks the Real Need for Workplace Accommodations to Maintain Health.

Individuals with diabetes, seizure disorders, mental health disabilities, symptomatic or asymptomatic HIV, cancer, hepatitis, and other conditions often require workplace accommodations to maintain their health:

Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to . . . pursue therapy or treatment for their handicaps. . . . In some instances, this may require employers to alter existing policies or procedures that they would not change for non-handicapped employees, but that is the essence of reasonable accommodation.

Buckingham v. United States, 998 F.2d 735, 740-41 (9th Cir. 1993) (citations and internal quotations omitted) (upholding transfer to obtain medical treatment). While individuals with these conditions may not be currently experiencing significant symptoms, see *Bragdon v. Abbott*, 118 S. Ct. 2196, accommodations are often needed to prevent a more active phase of their disability. Without consistent monitoring and treatment, many disabled individuals will experience a worsening of their conditions.

For example, many disabled persons require periodic visits to doctors and other health care providers.

Because most health care providers operate during business hours only, scheduling accommodations are required.²⁸ Similarly, some disabilities are exacerbated by working a night or split shift.²⁹ Assuming no undue hardship, a shift adjustment may be a reasonable accommodation.

Further, many disabled individuals with treated disabilities rely on breaks to take medications or to otherwise monitor their conditions.³⁰ Such breaks can enable individuals with asymptomatic HIV and other conditions to comply with complicated treatment and medication regimens, thereby maintaining health and gainful employment. Excluding individuals with mitigated disabilities would impede these results.

C. Excluding Individuals Who Mitigate Their Symptoms with Medications and Other Measures Falsely Presumes a "Complete Cure."

Excluding individuals who alleviate their symptoms with medications and other mitigating measures falsely

²⁸ The EEOC has recognized that time off for doctor's appointments, breaks for monitoring medications, and shift adjustments may be reasonable accommodations. EEOC, Technical Assistance Manual (TAM), Sec. 3.10(3), p. III-22 to III-23 (Jan. 1992); *EEOC Enforcement Guidance on Psychiatric Disabilities* 24-25; see also 42 U.S.C. § 12111(9)(B) ("modified schedule" as accommodation).

²⁹ See *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996), (summary judgment denied where clerk sought transfer after night shift aggravated depression); H.R. Rep. No. 485(II) at 62-63; S. Rep. No. 116 at 31.

³⁰ See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 856 (1st Cir. 1998) (successful control of diabetes required ongoing monitoring of glucose levels, and two to four insulin injections daily); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737 (N.D. Ill. 1998) (diabetic's request for greater access to bathroom for urination and insulin injections created triable issue of fact).

presumes a "complete cure" that is simply absent. Many individuals who rely on mitigating measures continue to experience limitations, albeit lessened, that require accommodations.³¹ Further, many individuals who control their symptoms must closely monitor their conditions in ways that nondisabled people do not. Many will periodically experience difficulties with their medications triggering active symptomology and necessitating accommodations. See *Harris v. H & W Contracting, Co.*, 102 F.3d 516 (11th Cir. 1997) (change in medication caused panic attack and eight-day hospitalization for individual with Graves Disease ordinarily stabilized with medication).

Moreover, individuals undergoing treatments or taking medications for various conditions may experience side effects such as nausea or grogginess.³² These side effects themselves may require accommodation. *EEOC Enforcement Guidance on Psychiatric Disabilities*, p. 31, question 31, example B; see also *Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2nd Cir. 1992) (finding nurse with depression disabled, and noting side effects of medication requiring accommodation); *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (noting side effects of medication requiring accommodation); *Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198, 200 (E.D. Penn. 1994) (job modification sought for medication side effects).

³¹ Goodwin, Frederik K. and Jamison, Kay Redfield, *Manic Depressive Illness* 597 (1990); Fisher, R.S., et al., "A Large Community-Based Survey of Quality of Life and Concerns of People With Epilepsy: Part 1," 39:6 *Epilepsia* (1998).

³² Lickey, Marvin E. and Gordon, *Medicine and Mental Illness* 129 (1991).

D. Excluding Individuals with Treatable Disabilities Would Lead to Irrational and Pernicious Results.

A statute should not be construed to mandate irrational or pernicious results. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Under the rules adopted below, an individual who relied upon an accommodation to obtain ongoing medical treatment for a disability, and thereby successfully controlled his or her symptoms, would then lose the right to accommodation and be forced to discontinue treatment until the symptoms once again became active. See *Bragdon*, 118 S. Ct. at 2213-14 (Ginsburg, J., concurring) ("No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible."). Ultimately, unemployment could result, in direct contravention of the statute's purposes.

Further, the reasoning adopted below would foster a perverse disincentive to maintaining health and controlling symptoms through measures such as medicine, diet, rest, and monitoring. See *Arnold*, 136 F.3d at 863 n.7 (Arnold "should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes under control.").

VII. THE CONCERNS OF EMPLOYERS ARE AMPLY REPRESENTED.

Giving a broad interpretation to the definition of disability does not undermine the concerns and interests of employers, which are amply protected through other provisions of the Act. For example, an individual who is not "qualified . . . with or without accommodation" for the job, or who poses a "direct threat," is not protected under

Title I of the ADA. 42 U.S.C. §§ 12111(8), 12112(a), 12113(b). Similarly, if the required accommodation would impose an "undue hardship," the employer may not be held liable. 42 U.S.C. §§ 12112(b)(5)(A), 12111(10).

That individuals are considered in their unmitigated states does not automatically mean that they are "substantially limited" in a major life activity, creating "per se" disabilities. An individual must still show that without mitigation one or more major life activity is substantially limited "in comparison to most people." S. Rep. No. 116 at 23; H.R. Rep. No. 485(II) at 52; *see also id.* ("A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."); 29 C.F.R. Pt. 1630, App., § 1630.2(j) ("[A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population."). Thus, an individual who wears glasses for myopia must show that his or her visual impairment is substantially limiting compared to most people: in light of the prevalence of mild near-sightedness, an individual with low myopia is unlikely to meet this standard.

VIII. INDIVIDUAL WHO ARE DENIED EMPLOYMENT OPPORTUNITIES ON THE BASIS OF A DISABILITY ARE REGARDED AS HAVING A DISABILITY.

The definition of disability under the ADA includes multiple "prongs" designed to ensure that all individuals who experience discrimination on the basis of disability --

including those individuals with no present limitations -- are protected. Thus, in addition to protecting individuals with substantially limiting impairments, the Act protects individuals with a "record of" disability,³³ and individuals who are "regarded as" having a disability.

Although there is no reason that an individual cannot be covered under more than one "prong,"³⁴ the statute's structure suggests a sequential analysis as a practical matter: "An individual who satisfies this first part of the definition of the term 'disability' is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition." 29 C.F.R. Pt. 1630, App., § 1630.2(j).

Under the third prong of the ADA's definition of disability, a person is disabled if he or she is "regarded as" having an impairment that is substantially limiting. 42 U.S.C. § 12102(2)(C). The provision is essential to those

³³ *See, e.g., Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1382 (3d Cir. 1991) ("A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Thus, for example, a person who has recovered from a history of mental or emotional illness, heart disease, or cancer may always be a handicapped individual under the statute.").

³⁴ *See Arnold*, 136 F.3d at 862 ("There is no reason this employee could not be protected under two prongs simultaneously."); Brief of the EEOC, *Graham v. Connie's Inc.*, No. 98-35242 (9th Cir.) (filed July 15, 1998), p. 17 ("Nothing in the statute suggests that the three prongs of the definition are mutually exclusive. . . . [T]he individual might qualify under both the 'actual' and 'regarded as' prongs of the definition, since the impairment may be substantially limiting in fact and perceived as such by the employer.").

who are not in fact substantially limited, but who face limitations imposed by the unfounded stereotypes of others.

In *Arline*, the Court interpreted identical language found in Section 504, stating:

By includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired . . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284. The Court reasoned that Congress intended to protect individuals from decisions based on stereotypes and assumptions about a particular condition, rather than objective, reasoned assessments. *Id.* at 284-85.

In enacting the ADA, Congress adopted Section 504's "regarded as" language, as well as this Court's interpretation of the provision. Indeed, a thorough analysis of *Arline* is included in all three major committee reports:

The [*Arline*] Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. . . . The Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

H.R. Rep. No. 485(II) at 53; H.R. Rep. No. 485 (III) at 30; S. Rep. No. 116 at 23.

Accordingly, an individual rejected from a particular job because an x-ray indicates abnormalities is "regarded as" disabled, even if the person has no outward symptoms. H.R. Rep. No. 485 (III) at 31; S. Rep. No. 116 at 24. Similarly, the "regarded as" prong protects individuals with controlled diabetes and epilepsy who are denied jobs as a "result of negative attitudes and misinformation." S. Rep. No. 116 at 24.³⁵ Also falling within the third prong are "people who are rejected for a particular job solely because they wear hearing aids. . . ." *Id.*

Thus, under the *Arline* standard adopted by Congress in enacting the ADA, an employer that bases its employment decision on a person's actual or perceived physical or mental impairment -- whether substantially limiting or not -- regards the individual as disabled:

A person who is . . . discriminated against [] because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.

H.R. Rep. No. 485(II) at 53; S. Rep. No. 116 at 24. Further, such disability-based decisions are unlawful when they are not rationally related to the individual's ability to perform

³⁵ Although Congress intended that treatable conditions be evaluated without mitigating measures as "first prong" disabilities, it conceived that such conditions also fit within the third prong. Further, those conditions that are *not* substantially limiting, even in the absence of mitigation, might be "regarded" by others as disabilities.

the job. See *Arline*, 480 U.S. at 285; H.R. Rep. No. 485 (III) at 30-31.

Any other rule would be contrary to the Act's purposes. That is, if the ADA did *not* cover individuals whose disqualification rested on their physical or mental conditions, such individuals "would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent." *Arline*, 430 U.S. at 285.

In *Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997), the plaintiffs presented evidence that United Air Lines disqualified them from all pilot positions because of its perception that they were unable to perform the job with their physical impairment of myopia.³⁶ Based on this impairment, and with no objective or reasoned assessment of actual ability to safely perform, United concluded that the applicants were unsuitable for employment as pilots. This conclusion is contrary to federal disability law, which requires employers to "replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." See *Arline*, 480 U.S. at 284-85.

Instead of evaluating United's reaction, the Tenth Circuit held that the plaintiffs "must show that the employer regarded [them] as being substantially limited in performing either a class of jobs or a broad range of jobs in

³⁶ Although United now asks the Court to examine the women's impairments as ameliorated by corrective lenses, under its own policy United considered these impairments in their uncorrected state, a stance that indeed emphasizes the need for "third prong" protection.

various classes." 130 F.3d at 904. Because the plaintiffs could not show disqualification from a "class of jobs," the court concluded that they were not regarded as disabled. *Id.*

Nothing in *Arline* or the ADA's legislative history suggests this narrow reading. The *Arline* Court explained that a person could be limited in working if rejected because of a particular employer's perceptions about the impairment. 480 U.S. at 283. There was no requirement that other employers would have also discriminated. In fact, the ADA's legislative history specifies precisely the opposite. See H.R. No. 485(III) at 30 (third prong applies "whether or not the employer's perception was shared by others in the field"). Indeed, the Tenth Circuit's analysis improperly rewards employers whose qualification standards are the *most* arbitrary.

The district court in *Murphy v. U.P.S.*, 946 F. Supp. 872 (D. Kan. 1996), *aff'd*, 141 F.3d 1185 (10th Cir. 1998), also failed to engage in the analysis dictated by *Arline* and the Congress. In accepting UPS's assertion that it did not regard the plaintiff as disabled, but as "not certifiable under DOT regulations,"³⁷ the court incorrectly confused the question of disability with whether Mr. Murphy was qualified for the job.³⁸ In so doing, the court disregarded evidence that Mr. Murphy was fired because UPS falsely

³⁷ In seeking a review of Mr. Murphy's DOT status and thereupon firing him without objective evidence that his impairment imposed a safety risk, UPS adopted DOT's own questionable rationale.

³⁸ The legitimacy of an employer's purported reliance on a safety regulation must be evaluated separately from the question of an actual or perceived disability. *Arline*, 480 U.S. at 285-86.

regarded him as having a condition that would prevent him from driving safely.³⁹

CONCLUSION

In light of the fundamental purposes of the ADA, the express intent of Congress, and the body of case law decided both before and ~~after~~ the ADA's enactment, the Court should reverse and remand the decisions in *Sutton* and *Murphy* for an analysis of whether the plaintiffs' impairments, in the absence of mitigating measures, constitute protected disabilities.

Further, pursuant to the Court's decision in *Arline*, this Court should reverse the Tenth Circuit's conclusion that plaintiffs Sutton and Murphy were not "regarded as" disabled by the employers that rejected them.

Respectfully submitted,

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³⁹ Mr. Murphy passed a physical, received a DOT Health Card, and drove UPS vehicles without incident; however, he was fired once UPS received his blood pressure results. 946 F. Supp. at 875-76.

APPENDIX

APPENDIX

AIDS Action is the national voice on AIDS, representing 3,200 of America's leading AIDS organizations and the millions of Americans affected by HIV/AIDS they serve. AIDS Action fights the AIDS epidemic by working for public policy that prevents new HIV infections, provides care for people living with HIV and AIDS, defends their rights and searches aggressively for a cure. The organization educates policy makers, corporate leaders, the national media and the public and provides leadership and support to communities affected by HIV/AIDS. As the leading AIDS policy organization, AIDS Action maintains the strongest and most effective presence on Capitol Hill on issues affecting our members and constituents.

Since 1983, the AIDS Legal Referral Panel ("ALRP") has advocated on behalf of the rights of people living with HIV and AIDS. Through its staff and panel of volunteer attorneys, ALRP has assisted in over 30,000 legal matters, helping people with HIV/AIDS to maintain healthcare, shelter, income, autonomy and freedom from discrimination. In addition, ALRP represents the interests of people with HIV/AIDS and HIV-affected communities in national public policy discussions. Throughout the history of the AIDS epidemic, ALRP's clients have included individuals who work full or part time. Some have been asymptomatic. Many more have experienced physical symptoms but have been able to work due to the ameliorative effects of complex HIV drug regimens. It is imperative for people living with HIV/AIDS who are able to work to be protected against invidious discrimination and to be given all the opportunities to succeed that are afforded to individuals who are not facing life-threatening illness on a daily basis.

AIDS Legal Services ("ALS") was founded in 1988 as a program of the non-profit, Santa Clara County Bar Association Law Foundation. ALS provides legal services to low-income individuals living with HIV or AIDS in Santa Clara County, California. The mission of ALS is to secure justice and the protection of human rights through the development, delivery, and sponsorship of specialized legal services. ALS provides representation in, among others, the areas of access to services, employment and housing. Since its inception, ALS has assisted over 2,000 individuals living with HIV or AIDS.

AIDS National Interfaith Network ("ANIN") is an organization of HIV/AIDS ministries and faith communities that mobilizes people and institutions for education, advocacy and support of persons affected by HIV/AIDS. As people of faith and action, the members of ANIN affirm the inherent worth and dignity of all persons without prejudicial regard to race, gender, age, health/physical status, sexual orientation, religious commitment, relationship status, or legal/social standing. ANIN strives to assure that all those affected by HIV/AIDS will receive compassionate care, support and assistance. HIV/AIDS is not a divine punishment. Merciful and empowering love extends to all people affected by disease, including HIV/AIDS.

The Arc of the United States ("The Arc") is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation. Together, more than 1,100 state and local chapters of The Arc work to ensure that people with mental retardation can realize the opportunity to live, learn, work and play in their communities. Since its inception, The Arc has vigorously challenged attitudes and public policy based on false stereotypes that have authorized or encouraged segregation of people with mental retardation

in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act. Many people with mental retardation also have other conditions which can be ameliorated or treated through the use of medications or other measures.

The Center for Women Policy Studies is a national non-profit, multi-ethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than thirty research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. The Center's Metro DC Collaborative for Women with HIV/AIDS project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Center for Law in the Public Interest is a private, non-profit public interest law firm whose clients include individuals with disabilities, as well as groups that advocate on behalf of individuals with disabilities. In order to further the interests of these individuals, the Center engages in education, advocacy and litigation involving the Americans with Disabilities Act. The Center is active in advancing and protecting the interests of individuals with disabilities in local communities and on the state and federal levels. The issues presented by the instant cases will have significant impact on the individuals on whose behalf the Center advocates.

Disability Rights Advocates ("DRA") is a non-profit public interest law firm that specializes in class action civil

rights litigation on behalf of persons with disabilities throughout the United States. With offices in California and Hungary, DRA strives to protect the civil and human rights of people with disabilities throughout the world. DRA works to end discrimination in areas such as access to public accommodations, employment, transportation, education, and housing. In conjunction with the Disability Statistics Center at the University of California, San Francisco, DRA has published a report entitled, "Disability Watch: A Status Report on the Condition of People with Disabilities in the United States."

The Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has represented and continues to represent clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. The term "epilepsy" evokes

stereotyped images and fears that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears. The Foundation is also concerned that determinations of whether a person is disabled be made without regard to mitigating measures, such as anti-epileptic medications. People whose seizures are controlled by medication are not guaranteed that their seizures will stay under control. In addition, people who achieve sustained control of their seizures must face the fact that their employers still regard them as being disabled on a daily basis.

Gay and Lesbian Medical Association ("GLMA") is an organization of 2,000 lesbian, gay, bisexual and transgender physicians, medical students and their supporters. GLMA works to maximize the quality of health care and health services for lesbian, gay, bisexual and transgender people, to promote full civil rights and to foster a professional climate in which its diverse members can achieve their full potential.

Gay Men's Health Crisis ("GMHC") is the nation's oldest and largest AIDS service and advocacy organization. GMHC serves thousands of men, women and children living with HIV/AIDS; educates the public about HIV prevention and treatment; and fights for fair and effective AIDS policy at all levels of government. The Legal Services and Advocacy Department at GMHC represents HIV-positive clients who seek protection from discrimination within the meaning of the Americans with Disabilities Act ("ADA"). As new treatments show great promise for extended health and longevity, more and more people living with HIV/AIDS

place long-range importance on the ability to obtain and retain employment, with all of its financial and psychological benefits. Many people living with HIV/AIDS need accommodations to permit them to adhere to the treatment regimens that keep them healthy enough to continue to work. Additionally, symptoms incident to the very mitigating measures that enable them to work often create the need for the ADA's protection in the first instance.

The Human Rights Campaign ("HRC") is the nation's largest lesbian and gay civil rights organization. HRC is devoted to fighting and ending discrimination against gay men and lesbians and to protecting the basic civil and human rights of those Americans. HRC is also specifically devoted to fighting discrimination against people living with HIV and AIDS. To these ends, HRC has provided federal advocacy and media and grassroots support on a range of legislative initiatives affecting gay men, lesbians, and people living with HIV/AIDS, including the Americans with Disabilities Act and the Employment Non-Discrimination Act.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization which seeks to eradicate discrimination against people with mental disabilities in housing, employment and other services. The Center has advocated on behalf of many clients who have alleviated the symptoms of their conditions through therapy and medication; however, they may require periodic accommodations to their conditions which are often episodic in nature.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation,

education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns; in 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV and other disabilities, including, in part, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Co.*, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); *Chalk v. United States District Court*, 814 F.2d 701 (9th Cir. 1988); and *Raytheon v. Fair Emp. & Hous. Comm'n*, 212 Cal. App. 3d 1242 (1989). Lambda is particularly familiar with the unique barriers confronting persons with HIV and other stigmatized disabilities who attempt to secure fair treatment in the workplace.

The National Latina/o Lesbian, Gay, Bisexual and Transgender Organization ("LLEGÓ") is a national non-profit organization at the forefront of the Latina/o Lesbian, Gay, Bisexual and Transgender ("LGBT") community organizing for access to health, community development and political resources. Many of LLEGÓ's members are affected by HIV/AIDS, asymptomatic and otherwise. LLEGÓ maintains strong roots in the Latina/o LGBT communities across the United States, Puerto Rico and Latin America. More than 180 organizations and institutions comprise LLEGÓ's Network of Organizations, representing the diverse backgrounds of the Latina/o LGBT community. LLEGÓ has a proud legacy of eleven years of organizing and advocacy for individual and community empowerment.

Mental Health Advocacy Project ("MHAP") is a 20-year-old program of the Santa Clara County Bar Association Law Foundation, a California non-profit organization. MHAP's mission is to empower people affected by

psychiatric or developmental disabilities or labeled as having such disabilities to live more independent, secure and satisfying lives through the enforcement of their legal rights and the advancement of their social and economic well-being. To this end, MHAP helps over 4,000 clients per year resolve their legal problems in the areas of care and treatment, education, employment, housing, consumer rights and financial entitlements. MHAP regularly assists clients with securing vital reasonable accommodations and has first-hand knowledge about the effectiveness of reasonable accommodations in creating greater employment and housing opportunities for all individuals with disabilities.

The National Alliance for the Mentally Ill ("NAMI") is the nation's leading grassroots advocacy organization solely dedicated to improving the lives of persons with severe mental illnesses. NAMI has more than 185,000 members and 1,200 state and local affiliates in all fifty states, the District of Columbia, Puerto Rico and Canada. NAMI's efforts focus on support to persons with severe mental illnesses and their families; advocacy for nondiscriminatory and equitable federal, state, and private-sector policies; research into the causes, symptoms and treatments for brain disorders; and education to eliminate the pervasive stigma toward severe mental illnesses.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801 *et seq.*, and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. § 794e, to provide legal representation and related advocacy services on behalf

of all persons with disabilities. In fiscal year 1997 alone, P&As served well over 700,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of Government.

The National Center for Law and Learning Disabilities, Inc. ("NCLLD") is a non-profit corporation that seeks to promote understanding of learning disabilities ("LD"), attention deficit disorder ("ADD") and related conditions; knowledge of applicable laws; and development of appropriate policies. To achieve these goals, NCLLD provides education, advocacy, legal analysis and policy recommendations on issues affecting persons with LD/ADD. NCLLD supports the position that disability status should be determined without regard to the beneficial effects of medication, since often medication does not achieve a measurable, complete and permanent correction of the condition.

The National Center for Lesbian Rights ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm, founded in 1977 and devoted to the legal concerns and civil rights of all lesbian, gay, bisexual and transgendered persons, including those with disabilities.

The National Depressive and Manic-Depressive Association ("National DMDA") is the nation's largest patient-run, illness-specific organization. Founded in 1986 and headquartered in Chicago, Illinois, National DMDA has a worldwide, grassroots network of 275 chapters and support groups. It is guided by a 65-member Scientific Advisory

Board composed of the leading researchers and clinicians in the field of depressive illnesses.

The National Health Law Program ("NHeLP") is a national public interest firm that seeks to improve health care for America's working and unemployed poor, minorities, elderly and people with disabilities. NHeLP serves legal services programs, protection and advocacy offices, community-based organizations, the private bar, providers, and individuals who work to maintain a health care safety net for the millions of uninsured or underinsured low income people. NHeLP monitors Medicare, Medicaid and other publicly-funded health care programs; seeks remedies when laws and policies are ignored; and helps Americans receive needed medical care.

New York Lawyers for the Public Interest, Inc. ("NYLPI") is a non-profit public interest law office that works to protect the rights of people with disabilities. Through its Disability Law Center, NYLPI seeks to protect and promote the civil rights and liberties of people with disabilities and to enable them to participate fully in the mainstream of American life. NYLPI has been active on issues involving the application of the Americans with Disabilities Act ("ADA") to discrimination in employment, government services, and public accommodation. NYLPI represents individuals and files *amicus curiae* briefs on its own behalf and on behalf of disability and civil rights groups in cases around the country addressing the application of the ADA.

RESOLVE, the National Infertility Association, was founded in 1974 as a non-profit consumer organization. RESOLVE's mission is to provide timely, compassionate support and information to individuals who are experiencing infertility and to increase awareness of infertility issues

through advocacy and public education. RESOLVE's national office and its more than fifty chapters throughout the United States provide help to thousands of people experiencing the infertility crisis.

The World Institute on Disability is a private, non-profit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.

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CLERK

In The
Supreme Court of the United States

October Term, 1998

— ♦ —
ALBERTSON'S INC.,

v.

Petitioner,

HALLIE KIRKINGBURG,

Respondent.

— ♦ —
VAUGHN L. MURPHY,

v.

Petitioner,

UNITED PARCEL SERVICE,

Respondent.

— ♦ —
KAREN AND KIMBERLY SUTTON,

v.

Petitioners,

UNITED AIRLINES, INC.,

Respondents.

— ♦ —
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth And Tenth Circuits**

— ♦ —
**BRIEF OF SENATORS HARKIN AND KENNEDY,
REPRESENTATIVES HOYER AND OWENS AND
FORMER SENATOR DOLE AS AMICI CURIAE
IN SUPPORT OF RESPONDENT KIRKINGBURG
AND PETITIONERS SUTTON AND MURPHY**

— ♦ —
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INTEREST OF AMICI*

The following Senators and Congressmen were primary authors and sponsors of the Americans with Disabilities Act and have been leaders in shaping this nation's disability policy.

Former Senator Bob Dole, a war veteran with a disability, was a key proponent of securing equal opportunity for people with disabilities during his years in the Senate, including playing a leadership role in the development of the ADA.

Senator Tom Harkin was the chief sponsor and a principal author of the ADA. As Chair of the Subcommittee on Disability Policy of the Senate Committee on Labor and Human Resources, and floor manager, he was involved in all aspects of the passage of the ADA.

Congressman Steny Hoyer was the lead House co-sponsor of the ADA. He led the House passage of the legislation and was intimately involved in all aspects of its consideration.

Senator Edward Kennedy, a principal author of the ADA, was the Chair of the Senate Committee on Labor and Human Resources during its passage.

Congressman Major Owens was Chair of the Subcommittee on Select Education of the Committee of Education and Labor during the deliberations on the ADA and was involved in all deliberations in the House.

Amici, current and former members of Congress, file this brief on behalf of the petitioners in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997) and *Murphy v. United Parcel Service*, 141 F.3d 1185 (10th Cir. 1998) and the respondent in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) in order to address the issues raised about the proper analytical framework for deciding whether an individual is "disabled" for purposes of Americans with Disabilities

* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Act (ADA) coverage.¹ *Amici* are deeply concerned by the growing trend in the lower courts to use what was intended as a broad statutory definition of disability to cut off exactly the types of claims the ADA was designed to address. Closing the door at the threshold coverage stage not only denies protection to millions of Americans that Congress sought to protect but also condones exactly the conduct Congress intended to eliminate.

Amici take no position in this brief on the issues raised about job qualifications. Rather, this brief focuses on the common issue in these cases, which is that individuals who are being denied employment because of their impairments are being barred from an opportunity to demonstrate their qualifications by being stripped of coverage under the ADA. The rationale established in these cases will have a profound impact on the future viability of the ADA for individuals with a wide variety of other medical conditions – including diabetes, epilepsy, mental illness, and cancer – that Congress clearly intended to be included under the ADA's definition of disability.

SUMMARY OF THE ARGUMENT

The fundamental purpose of the ADA is "to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities" 42 U.S.C. § 12101(b)(1). This purpose has been eroded by restrictive interpretations of the threshold requirement in any ADA suit, that plaintiff be an "individual with a disability." Dismissals, often at the summary judgment stage, preclude plaintiffs who

¹ It is important to note that although the cases currently before the court arise in the employment context under Title I of the ADA, the definition of disability contained in 42 U.S.C. § 12102(2) applies to Title II (state and local governments) and Title III (public accommodations) as well. If the restrictive interpretations developed in the lower courts in Title I employment cases are sustained by this court, it will be difficult for any individual whose impairment is responsive to medication or other assistive device to bring an action under Titles II or III.

have been rejected because of their physical or mental impairments from ever having the opportunity to show that they are qualified for the job.

As this Court recently recognized in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the definition of disability in the ADA is patterned after the definition in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) In enacting the ADA, Congress was well aware that the definition was broad and not limited to traditional disabilities. Congress was guided by this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which recognized that the breadth of the definition reflected Congress' desire to address a variety of situations where a physical or mental impairment is used to foreclose participation in the community, including working. As the Court stated: "[t]he Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments; the definition of [disability] is broad, but only those individuals who are both [disabled] and otherwise qualified are eligible for relief." *Arline* at 284-285.

The Tenth Circuit opinions in *Sutton* and *Murphy* unduly restrict the definition of disability by refusing to defer to consistent agency interpretations and legislative history which states that in evaluating whether an impairment substantially limits a major life activity, the impairment must be evaluated without regard to mitigating measures. Since the language of the statute is at least ambiguous, a court "may not substitute its own construction . . . for a reasonable [agency] interpretation." *Chevron, USA Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Indeed, an employer who refuses to consider the mitigating measure when it rejects the plaintiff based on the underlying impairment should not be able to use the success of the mitigating measure to defeat ADA coverage. Moreover, the agencies' interpretation is more in tune with the actual nature of mitigating measures. For example, while epilepsy, diabetes and mental illness are subject to mitigation through medication, the relative degree of success varies not only from

person to person, but for any given individual it depends on a number of variables. The changing nature of the effectiveness of medicines and other assistive devices over time makes an "impairment with mitigation" rule unstable and inconsistent.

If this Court decides that mitigating measures should be taken into account for purposes of determining whether an impairment is actually "substantially limiting," then an alternative basis for coverage is the "regarded as" prong of the disability definition. 42 U.S.C. § 12102(2)(C). As this Court recognized in *Arline*, Congress intended to address exclusionary practices based on medical conditions by including in the definition of disability people whose impairments are not substantially limiting, but who nevertheless are substantially limited by the "negative reactions of others to the impairment." 480 U.S. at 283. The lower courts, as illustrated by the Tenth Circuit here, have effectively repealed the "regarded as" prong by requiring that plaintiffs be actually substantially limited in order to be regarded as such. Moreover, in the employment context, courts are routinely granting summary judgment on the grounds that rejection from a "single job" does not mean that the employer regarded the plaintiff as substantially limited in working. In so doing, the courts are creating burdens for plaintiffs which are often illogical and insurmountable. The proper approach is for the employer's rejection to be given its natural meaning, which is that the employer regards the plaintiff as unable to do the tasks involved in the type of job for which the plaintiff was rejected. In most cases, this will, at a minimum, raise a genuine issue of fact as to whether the employer regarded the plaintiff as substantially limited in working.

The overly restrictive interpretations given to the definition of disability have resulted in the dismissal of ADA claims for plaintiffs with a wide variety of disabilities that Congress explicitly intended to cover. Being "disabled" within the meaning of the ADA does not mean the plaintiff wins. The plaintiff must still show that he or she was discriminated against on the basis of disability and is qualified to perform the essential functions of the job. 42 U.S.C. § 12112; 42 U.S.C. § 12111. As this Court stated in *Arline*, 480 U.S. at

284, exclusion at the coverage stage leaves these individuals "vulnerable to discrimination on the basis of mythology . . . precisely the type of injury Congress sought to prevent."

ARGUMENT

I. THE DEFINITION OF DISABILITY IS BROAD IN ORDER TO ACHIEVE THE NON-DISCRIMINATION GOALS OF THE ADA.

During congressional hearings concerning the ADA, Congress learned that employers routinely used employment criteria based on physical and mental characteristics to deprive otherwise qualified individuals of the opportunity to work.² The Senate Report stated:

The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still persuasive today.³

² The findings and purposes section of the ADA, 42 U.S.C. § 12101(a)(5) (1990) cites "exclusionary qualification standards and criteria" as a type of discrimination continually faced by people with disabilities. See Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 9-10 (1989) [hereinafter Senate Report] (citing testimony enumerating major categories of job discrimination faced by people with disabilities including: use of standards and criteria that have the effect of denying opportunities; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism and acceptance by coworkers; and use of application forms and other pre-employment inquiries that inquire about the existence of disability rather than about the ability to perform the essential functions of the job).

³ *Id.* at 37.

Congress concluded that exclusion on the basis of physical or mental impairments was not only harmful to the self-sufficiency and dignity of the individual, but to society as a whole.⁴ Just as Congress sought to eradicate policies that discriminated on the basis of race and sex when it enacted Title VII of the Civil Rights Act of 1964,⁵ so too did Congress seek to remove the vestiges of exclusionary, irrational policies based on physical or mental impairments when it enacted the ADA.⁶

Congress thus defined the class to be protected under the ADA broadly, defining an "individual with a disability" as a person who (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2). By passing through the initial threshold requirement of establishing that he or she has a disability under the ADA, however, a plaintiff has only satisfied one part of a three-part *prima facie* case

⁴ 42 U.S.C. § 12101(a)(9) ("the continuing existence of unfair and unchanging discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses from dependency and nonproductivity"); Senate Report at 16-17 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."); 136 Cong. Rec. S10,713 (1990) (statement of Sen. Harkin quoting Attorney General Richard Thornburgh) ("We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country").

⁵ 42 U.S.C. 2000e-2 through -17 (1994); S. Rep. No. 872, 88th Cong., 2d Sess. at 23 (1964) ("The pledge of this Nation is to secure freedom for every individual" and "that pledge will be furthered by the elimination of [discriminatory] practices").

⁶ Congress sought to address pervasive discrimination based on "stereotypic assumptions," 42 U.S.C. § 12101(a)(7) through a "... comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1).

under the ADA. The plaintiff must *also* show that he or she is qualified to perform the essential functions of the job, and that he or she was excluded from employment because of his or her disability.⁷ The proper approach to this three-part *prima facie* case is to broadly interpret the definition of disability, so that a fact-specific inquiry into the individual's qualifications can be pursued.

As the Supreme Court stated in *Arline*, 480 U.S. at 284-285 (1987), about the virtually identical definition of disability under the Rehabilitation Act, "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individuals is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief."⁸

The unduly narrow interpretation of the definition of disability illustrated by the Tenth Circuit opinions in *Sutton* and *Murphy* perpetuates a Catch-22 that was not contemplated

⁷ See e.g., *Lawrence v. National Westminster Bank of N.J.*, 98 F.3d 61, 68 (3d Cir. 1996); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996).

⁸ As this Court stated in *Bradgon v. Abbott*, 118 S. Ct. 2196, 2201 (1998), "[t]he ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) . . . Congress' repetition of a well-established term carried the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." Section 504 case law consistently recognized individuals with impairments subject to mitigation or who were asymptomatic as covered by Section 504. *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (seizure disorder); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989), (insulin dependent diabetes); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), (asymptomatic hepatitis B). See also, *Bradgon* at 2208 (listing section 504 cases covering individuals with asymptomatic HIV infection).

by Congress. Defendants are excluding individuals because of physical or mental impairments and then claiming that the rejected applicant or employee is not covered by the ADA because he or she is not disabled. In other words, the plaintiff is too disabled to do the job, but not disabled enough to be protected by the ADA.

For example, UPS argued that Mr. Murphy should not be able to claim that he was both substantially limited and qualified.⁹ The Tenth Circuit affirmed the district court's view that the plaintiff should not "have it both ways" or withstand a motion for summary judgment based on "such inconsistent positions."¹⁰ This is where the Tenth Circuit gets it exactly wrong. It was Congress' intent not to let *employers* "have it both ways". It was Congress' intent to disallow *employers* from obtaining summary judgment based on these "inconsistent positions" that motivated Congress to enact an expansive definition of disability under the ADA.

Instead of allowing the cases to proceed on the merits of whether an individual is qualified, the courts are fusing these two distinct inquiries of (1) whether plaintiff is a "person with a disability" and (2) whether the plaintiff is qualified to do the job, and penalizing plaintiffs for taking what is characterized as "inconsistent positions." The whole premise of the ADA is that individuals can be both "disabled" and able at the same time. The three prong definition of disability is not meant to be a legalistic trap but instead was drafted to convey the wide range of situations where impairment status is the subject of discriminatory action. This Court's understanding and explanation of this Congressional intent in *Arline* has been virtually ignored by the lower courts.

⁹ The District Court stated: "To demonstrate that he is disabled, Murphy sets forth several of the serious consequences which can result from his high blood pressure. Then in subsequent section of his brief, Murphy, in an effort to demonstrate that he is qualified for the position at UPS, essentially argues that his high blood pressure posed no threat or obstacle to the performance of his duties as mechanic. *Murphy*, 946 F. Supp. 872, 878 (1996).

¹⁰ *Id.* at 878-879.

There can be no doubt that Congress did not intend medical and technological advancements which mitigate the effect of impairments enabling independence and self sufficiency to strip individuals with physical or mental conditions of protection under the first prong of the definition of disability. Moreover, Congress was not only concerned with protecting people with actual disabilities but also with prohibiting employers from using arbitrary medical criteria as the basis for excluding individuals with physical or mental impairments. The "regarded as" prong of the ADA was enacted so that employers cannot "have it both ways."

II. CONGRESS MADE CLEAR ITS INTENT THAT THE FIRST PRONG OF THE DEFINITION OF DISABILITY BE DETERMINED WITHOUT CONSIDERATION OF MITIGATING MEASURES.

The only plausible interpretation of the plain language of the ADA, the legislative history and agency interpretations is that coverage under the first prong of the definition of disability must be decided without reference to mitigating factors.

A. The Plain Language.

The first prong of the statutory definition of disability states that "[t]he term disability" means, with respect to an individual – a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The purpose of the phrase "substantially limits one or more major life activities" is to distinguish minor, trivial impairments, from those that have a significant impact on a person's life.¹¹ By prohibiting discrimination against people who fall within the first prong of the definition of disability, Congress intended to protect individuals with significant impairments from being discriminated against on the basis of those impairments.

¹¹ As stated in the Senate Report, "Persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity." Senate Report at 23; House Report (II) at 52.

The plain language of the statute simply looks at whether the impairment substantially limits a major life activity. Requiring a court to look at the impairment in its mitigated state (*i.e.*, after the individual has taken medication or used a prosthetic device) would undermine the purpose of the first prong, which is to prohibit discrimination on the basis of the impairment itself. In *Bragdon*, Justice Ginsburg stated that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination where the disease, though present, is not yet visible." *Bragdon*, 118 S. Ct. at 2214. It would make just as little sense to prohibit discrimination on the basis of an impairment where the impairment is not ameliorated by mitigating measures, but to permit discrimination on the basis of the very same impairment simply because the individual with the impairment is taking medication or using a prosthetic device.

A rule which relies on mitigating measures is also problematic from a practical point of view. While there have been great strides in medications to help mitigate the effects of a variety of disabilities, factoring in mitigating measures adds often unpredictable and ever changing variables. Most people with conditions that rely on medication are constantly readjusting their doses and prescriptions, with more or less success. If the "disability" determination was contingent on the success or failure of mitigating measures, someone could be covered by the ADA one month and not the next.

For example, insulin, food, and exercise are mitigating measures persons with diabetes can use to achieve health and independence.¹² However, even the most stringent awareness and the most diligent balancing of these factors cannot eliminate the inherent limitations of diabetes.¹³ Blood sugar levels, and, therefore, insulin needs, unpredictably respond to external forces such as stress, allergies, and illness.¹⁴ While one

¹² American Diabetes Association, *Medical Management of Type 1 Diabetes*, 60 (3d ed. 1998).

¹³ *Id.* at 60-61, 71-72.

¹⁴ *Id.* at 73, 77-79, 82.

may know how much insulin to administer to maintain a healthy blood sugar range in the normal course of a normal day, one cannot know how much insulin to give to ameliorate the effects of uncontrollable external forces. *Id.* at 61, 71-72, 76.

Like diabetes, mental illnesses fluctuate in severity over time.¹⁵ Moreover, medications like Lithium for bipolar disorder and Risperdol for schizophrenia help control the most severe symptoms of these disorders, but they do not cure them.¹⁶ In fact, it is very common for people with bipolar disorder to remain stable on Lithium for extended periods of time, only to deteriorate and require intensive interventions to stabilize their Lithium levels.¹⁷ Moreover, psychiatric medications, particularly the more powerful psychotropics, have strong side effects that, in some instances, can be debilitating in and of themselves.¹⁸

Likewise, while the majority of people with epilepsy have their seizures controlled through medications,¹⁹ there are few who can maintain complete control at all times. Approximately fifty percent of the 2.3 million people with epilepsy achieve good control through current therapies.²⁰ Another 30

¹⁵ Fuller Torry, M.D., *Surviving Schizophrenia*, 189 (3rd ed. 1985), ("Both schizophrenia and diabetes have relapses and remissions in a course which often lasts over many years, and both can be well controlled, but not cured, by drugs").

¹⁶ National Alliance for the Mentally Ill, *Understanding Manic Depression* (1997); National Alliance for the Mentally Ill, *Understanding Schizophrenia* (1997).

¹⁷ Frederick K. Goodwin, M.D. & Kay Redfield Jamison, Ph.D., *Manic Depressive Illness* 597 (Oxford University Press 1990).

¹⁸ Richard S. Keefe & Phillip D. Harvey, *Understanding Schizophrenia* 437-440 (The Free Press 1994).

¹⁹ Epilepsy Foundation of America, *Epilepsy: A Report to the Nation* (1999).

²⁰ R.S. Fisher, et al., A Large Community-Based Survey of Quality of Life and Concerns of People with Epilepsy: Part 1, *Epilepsia* Vol. 39, Supp. 6 (1998).

percent achieve partial control, and the rest have seizures that cannot be controlled through any current treatment.²¹ There may be a period of weeks, months, or even years, where seizures are well controlled, and then seizures may recur.²²

Breakthrough seizures, even among people on medications, can occur for any number of reasons, but commonly include illness,²³ lack of sleep,²⁴ hormonal or metabolic changes,²⁵ and changes in medications.²⁶ Moreover, anti-seizure medication may also cause side effects that have varying degrees of impact on individuals' daily lives.²⁷ Because of side effects, people with epilepsy struggle with finding the right medication, in the smallest possible dose, to maintain seizure control, while obtaining optimal functioning.²⁸

²¹ *Id.*

²² *Id.*

²³ N. Santilli, Selection and Discontinuation of Antiepileptic Drugs, in *Managing Seizure Disorders: A Handbook for Health Care Professionals*, edited by N. Santilli, Lippincott-Raven Publishers, Philadelphia 1996.

²⁴ Schachter, S. Treatment of Seizures, in *The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide*. Edited by Steven C. Schachter, and Donald L. Schomer, Academic Press, San Diego 1997.

²⁵ Herzog AG, Klein P., Ransil BJ, Three patterns of catamenial epilepsy, *Epilepsia*, 1997;38:1082-1088.

²⁶ *Supra* n.21.

²⁷ *Id.*

²⁸ Devinsky, Orrin, Antiepileptic Drug Therapy, in *Guide to Understanding and Living with Epilepsy*. F.A. Davis & Co., Philadelphia, 1994.

Epilepsy, diabetes, and mental illness are repeatedly referenced in the legislative history as conditions which Congress intended to cover in the ADA. (epilepsy) Senate Report at 22, 31, 39, 62, House Comm. On Education and Labor, H.R. Rep. No. 985 (II), 101st Cong., 2d Sess. at 51, 52, 62, 72, 79, 80 (1990) [hereinafter House Report (II)], House Comm. On the Judiciary, H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. at 28, 29, 33, 42, 50 (1990) [hereinafter House Report (III)]; (diabetes) Senate Report at

Just as an individual could be disabled one month and not the next, two individuals with the exact same impairment could be "disabled" or not, depending on, among other things, their level of responsibility and commitment to a medical regimen and access to good medical care. Ironically, the more disciplined individual would be unable to invoke ADA protection if discriminated against based on the underlying impairment, while the less disciplined counterpart could invoke the ADA's protections. This simply does not make sense.

The next logical step in this line of reasoning could even be that in determining coverage under the ADA, courts would have to inquire whether the effects of the impairment could be controlled if the individual was more vigilant, had a better doctor, was better educated about the consequences of failing to follow a medical regimen, etc. There is no natural stopping point in the proposition that mitigating measures should be considered in determining first prong coverage. Never would this Court have anticipated that when it stated in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1984) that "technological advances can be expected to . . . qualify [people with disabilities] for . . . employment," that those same technological advances would be used to strip plaintiffs of coverage under the ADA.²⁹

B. Given that the Plain Language is At Least Ambiguous, The Court Should Defer to Explicit Legislative History and Authoritative Agency Interpretations.

When drafting the ADA, Congress explicitly considered the issue of mitigating measures, and consistent with the

22, House Report (II) at 51-52, House Report (III) at 42; (mental illness) Senate Report at 39, 62, House Report (II) at 72, 79, House Report (III) at 28.

²⁹ Like *Arline*, *Southeastern* interpreted the ADA's predecessor statute, Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794 (1988 ed.).

intent that coverage be broad, concluded that mitigation should not be considered in determining first prong coverage.³⁰ For instance, the House Committee on Education and Labor declared that:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Report (II) at 52.

³⁰ In addition to the authoritative Committee Reports discussed below, there is also ample evidence in the legislative record that Congress intended individuals who took medicine to ameliorate the effects of impairments to be covered by the ADA. See 135 Cong. Rec. S10765, S10766 (Sept. 7, 1989) (statement of Senator Harkin):

[I]f the disability would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive, or whatever it might be, is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job . . . [then] the employee would be able to go to the EEOC and file a complaint

See also Statement of Senator Domenici, *Id.* at 10779.

[T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certainly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Likewise, the House Judiciary Committee Report and the Senate Report state that the impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." House Report (III) at 28, Senate Report at 23.³¹

The agencies charged with interpreting and implementing the ADA appropriately incorporated this legislative history in directing that first prong coverage be decided without regard to mitigating measures. As this Court stated in *Bragdon*, with regard to interpretations by the Department of Justice, "[a]s the agency directed by Congress to issue implementing regulations, see U.S.C. § 12186(b) . . . and enforce Title III in court, the Department's views are entitled to deference." 118 S. Ct. at 2209. The same can be said of the EEOC, which has been charged with the obligation to issue regulations implementing Title I, 42 U.S.C. § 12116.

Both the DOJ and EEOC interpret the first prong of the definition as requiring a determination of substantial limitation to be made without regard to mitigating measures such as medicines, or assistance, or prosthetic devices. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999); 28 C.F.R. pt. 35, app. A § 35.104; pt. 36, app. B § 36.104 (1999). Given that the agency interpretations are not inconsistent with the plain meaning of the statute and are a reasonable interpretation, considering the uncertainties of mitigation, this Court should be guided by the admonition in *Chevron, U.S.A., Inc. v.*

³¹ Much has been made of the fact the Senate Report uses the example of individuals with controlled diabetes or epilepsy to illustrate third prong "regarded as" coverage. See discussion of "regarded as," *infra*. The Senate Report example only serves to underscore Congress' intent to cover such individuals. First, a person with diabetes or epilepsy that is controlled with medication or diet may not be substantially limited even without such measures. Second, and most importantly, the definition of disability is fluid, so that the example can be seen as either first prong if the effects of medication are not considered or third prong if they are. All of the contortions about the appropriate prong are unnecessary. What matters is that the individual is covered by the ADA, as Congress clearly intended.

National Resource Defense Council, Inc., 467 U.S. 837, 843-44 (1984):

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, explicitly or implicitly by Congress . . . [and] a court may not substitute its own construction . . . for a reasonable [agency] interpretation . . . " (quoting *Morton v. Ruiz*, 415 U.S. 119, 231 (1974)).

III. THE "REGARDED AS" PRONG OF THE DEFINITION OF DISABILITY IS INTENDED TO ADDRESS THE SUBSTANTIALLY LIMITING IMPACT OF NEGATIVE REACTIONS TO IMPAIRMENTS THAT ARE NOT OTHERWISE SUBSTANTIALLY LIMITING.

If this Court decides that substantial limitation must be decided after consideration of mitigating measures, then the plaintiffs should be covered under the "regarded as" prong of the definition of disability. 42 U.S.C. § 12102(2). The "regarded as" prong reflects the "civil rights" approach to disability discrimination, recognizing that problems faced by people with disabilities are often not inherent to the medical condition itself, but are rather the product of ignorance and prejudice.³² This was perfectly understood by this Court in *Arline*.³³

³² As Senator Weicker testified, "people with disabilities spend a lifetime overcoming not what God wrought, but what man imposed by custom and law." 136 Cong. Rec. S9684-03, *S9698 (1990). See, Jonathon C. Drimmer, *Cripples, Overcomers and Civil Rights; Tracing the Evolution of Legislation and Social Policy for People With Disabilities*, 40 U.C.L.A. L.Rev. 1341 (1993).

³³ Congress adopted the Court's interpretation of the definition of disability in the ADA. House Report (II) at 53; House Report (III) at 305.

To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Arline* at 279. . . .

. . . . By amending the definition . . . to include not only those who are actually physically impaired, but also those who are regarded as impaired, and who as a result are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. *Id.* at 284.

The entire purpose of the third prong is to provide a vehicle for examining exclusionary practices and to provide recognition that these exclusionary practices constitute substantial limitations in the lives of people with a wide variety of medical conditions. As the Supreme Court stated in *Arline*, "the basic purpose of [the statute] . . . is to ensure that [disabled] individuals are not denied jobs or other benefits because of the prejudicial attitudes or ignorance of others." *Id.* at 284.³⁴ Instead of giving credence to the breadth of the third prong, courts are creating burdens of proof for plaintiffs which are often illogical and insurmountable. Most troubling is the overuse of summary judgment to cut off ADA claims at the threshold coverage stage.³⁵

³⁴ In *Arline*, the Court quoted an *amicus* brief of the Epilepsy Foundation of America for the proposition that "[a] review of the history of epilepsy provides a salient example that fear rather than the handicap itself is the major impetus for discrimination against persons with handicaps." 480 U.S. at 285 n.13.

³⁵ See, Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 Harvard Civil Rights - Civil Liberties Law Review 99,

A. Congress and the Enforcing Agencies Adopted Long Standing Agency Interpretations of the "Regarded As" Prong of the Definition of Disability.

Congress patterned the ADA's "regarded as" prong on regulations implementing Section 504 of the Rehabilitation Act of 1973. *See Bragdon*, at 2202 (noting that Congress adopted previous regulatory interpretations of Section 504 when it enacted the ADA). As the House Judiciary Report explains,

The ADA uses the same "regarded as" test set forth in the regulations implementing Section 504 of the Rehabilitation Act. Those regulations provide:

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

House Report (III) at 29 citing 45 C.F.R. 84.3(j)(2)(iv).

Congress explicitly relied on the rationale articulated by this Court in *Arline* for an understanding of the meaning and scope of the "regarded as" prong.

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*. [480 U.S. 273 (1987).] The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as

110 (1999) (courts have misused the summary judgment rules to the disservice of plaintiffs in ADA employment cases).

disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

Senate Report at 23; House Report (II) at 53; House Report (III) at 30.

The Section 504 regulation was adopted by both the EEOC and the Department of Justice in their ADA regulations. 29 C.F.R. § 1630.2; 28 C.F.R. § 35.104. The interpretive guidance to the EEOC and DOJ regulations tracks the committee reports. 29 C.F.R. pt. 1630; app. § 1630.2; 28 pt. 35, app. A § 35.104 pt. 36, app. B § 36.104, respectively.

Accordingly, the "regarded as" prong is (1) intended to cover individuals who do not satisfy the requirements of the first two prongs of the definition of disability under the ADA, and (2) is meant to acknowledge that the negative reactions of others can be just as "substantially limiting" as the impairment itself. In other words, the third prong is intended to address societal barriers to full participation based on physical or mental impairments.

Courts, however, have had trouble reconciling the label "disabled" with an individual who is functioning well enough to work and take part in community events. Yet, this is exactly what Congress intended. As Judge Posner explained,

Disability is broadly defined. It includes not only "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual," but also the state of 'being regarded as having such an impairment.' The latter definition, although at first glance peculiar, actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied

employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995). It is necessary to provide an analytical framework for enforcing the "regarded as" prong which gives effect to Congress' purpose.

B. The Proper Analytical Framework.

It is useful to remember that the definition of disability is generic to the ADA, not attached to the specific provisions of any one Title. Therefore, it is necessary to develop an analytical framework that will work for all the Titles of the statute. It is helpful to first look at Title III, which covers public accommodations, because in the employment context the analysis often gets muddled and confused by issues related to qualifications for the job.

Under Title III, if a bakery refused service to an individual with facial scars, the bakery would be regarding the individual as disabled. It would not matter if there were other bakeries that would serve the person, or whether the baker thought that eating bakery goods was a major life activity. The prejudice of the baker is the limitation the third prong is meant to address. If the individual can establish that the bakery refused to serve the individual because of his facial scars, that would be sufficient to establish a *prima facie* case of discrimination under the third prong.³⁶ Cf. House Report (III) at 30. ("For example, severe burn victims often face discrimination in employment and participation in community

³⁶ The Department of Justice, in its section-by-section analysis to its regulations implementing Title III, adopts the view that a rejection based on disability by a public accommodation invokes the third prong of the definition of disability. The Department of Justice states:

which results in substantial limitation of major life activities.")

The question raised by *Sutton*, *Murphy*, and *Kirkingburg*, is how the third prong analysis should work in a Title I case. The legislative history indicates that when an applicant or employee is rejected from a job because of the individual's physical or mental impairment, there is at least a factual question as to whether the employer regarded the individual as being substantially limited in a major life activity, including working. The Senate Report gives as an example of individuals covered by the third prong "people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray."³⁷

The Judiciary Report confronts the issue directly, stating:

Thus, a person who is rejected from a job because of myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.³⁸

To underscore Congress' broad interpretation of coverage, the Judiciary Report states:

It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on a basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff qualifies for coverage under the "regarded as" test.³⁹

³⁷ Senate Report at 24.

³⁸ House Report (III) at 30.

³⁹ House Report (III) at 30-31.

Using this analysis, the EEOC cites concerns related to productivity, safety, insurance, liability, attendance, cost, accommodation, accessibility, worker's compensation costs or acceptance by co-workers and customers as examples of stereotypes, fears or misconceptions about disabilities.⁴⁰ The EEOC concludes that if an employer makes an adverse employment decision based on beliefs or fears that a person's perceived disability will cause problems in any of these areas, and the employer cannot show a legitimate nondiscriminatory reason for the action, the individual would be covered under the third prong of the definition.⁴¹

Too often, however, in the employment context, the lower courts are granting summary judgment to defendants, with the rationale that rejection from a "single job" is not enough to show that the employer regarded the rejected applicant or employee as substantially limited in the major life activity of working, or in any other major life activity.⁴² At

⁴⁰ 29 C.F.R. pt. 1630, app. §1630.2(1) (1999); EEOC *Technical Assistance Manual* at II-11.

⁴¹ *Id.*

⁴² Fortunately, some of the circuit courts are beginning to vacate such dismissals, recognizing that in most instances the issue of whether the employer regarded the plaintiff to have a disability is a question of fact. See *Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819-20 (7th Cir. 1997) (leaving issue of whether defendant was regarded as having disability for lower court on remand); *Best v. Shell Oil*, 107 F.3d 544, 549 (7th Cir. 1997) ("[A] trier of fact could find that [defendant] perceived [plaintiff] as having a disability that prevented him from working"); *Harris v. H.W. Contracting Co.*, 102 F.3d 516, 524 (11th Cir. 1996) (finding question of fact still exists with respect to "regarded as" prong); *Olson v. General Elec. Aerospace*, 101 F.3d 947, 955 (3d Cir. 1996) ("[I]t is clear that a reasonable fact-finder could infer that [defendant] perceived [plaintiff] to be disabled"); *Holihan v. Lucky Stores*, 87 F.3d 362, 366-67 (9th Cir. 1996) (holding that lower court erred in granting judgment as matter of law because the evidence could support finding that defendant regarded plaintiff as having disability); *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996) (finding evidence created

least part of the problem appears to stem from a misapplication of the EEOC's regulations, which define substantially limited in the major life activity of working as

"significantly restricted in the ability to perform either a class of jobs, or a broad range of jobs in various classes as compared to the average person having comparable training, skill, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

Hence, in a case under the *first* prong of the definition of disability, the plaintiff must allege that his/her impairment actually restricts him/her from performing a "class of jobs."⁴³

genuine issue of material fact with respect to "regarded as" prong); See also *EEOC v. Joslyn Mfg. Co.*, No. 95C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) ("[I]n order to survive summary judgment, the [plaintiff] only need raise a genuine issue of facts as to whether [the plaintiff's] perceived impairment substantially limited his ability to work, not actually prove as much.").

⁴³ The "single job" exception has also been interpreted too broadly by lower courts, to defeat first prong coverage. See Robert L. Burgdorf, "Substantially Limited" Protection from Disability Discrimination: The Special Treatment; Model and Misconstructions of the Definition of Disability, 42 Vill. L. Rev. 409 (1997).

The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with, among others, the following kinds of impairments: replacement of hips and shoulders (as a result of a vascular necrosis); diabetes; cancer; laryngectomy (removal of larynx); hemophilia; heart attack; absence of one eye; degenerative hip disease resulting in a limp; permanent severe limitations in use of the right arm and shoulder; various serious back injuries; depression and paranoia; a six-inch scar on the face resulting in supervisors calling the employee "scarface"; 'bilateral carpal tunnel syndrome'; "asthma; asbestosis; HIV infection; traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems

However, under the third prong, a plaintiff is alleging that he/she *can* perform the class of jobs represented by the job in question. Therefore, the plaintiff will not be able to demonstrate, nor would he or she have any interest in demonstrating, that he or she is precluded from the class of jobs involved. In most cases, the only evidence which will be available to plaintiff is the rejection by the defendant. It is not the rejection per se which gives rise to the "regarded as" claim, but the natural and ordinary implication of such a rejection. Usually, if an employer rejects an individual from a job because of the individual's impairment, it means the employer thinks the individual's impairment precludes the individual from doing the types of tasks the job requires. Therefore, in most cases, a rejection based on a medical condition raises, at a minimum, a material issue of fact as to whether the employer "regarded" the individual as "disabled" within the meaning of the ADA.

Summary judgment on the definition issue is inappropriate, except in cases where there is no conceivable set of facts from which a trier of fact could conclude that plaintiff was "regarded as" substantially limited in working or in any other major life activity. Self serving statements by a defendant that it did not regard the plaintiff as so limited cannot be the basis of summary judgment when the natural and predictable implication of the adverse treatment is otherwise.

abstracting and motor deficits; and stroke resulting in the loss of use of the left hand, arm and leg. (footnotes omitted)

For case cites see *id.* at 539-541 nn.643-661.

C. Analytical Problems with the Lower Court Decisions, as Illustrated by the Tenth Circuit Opinions.

The mistakes of the lower courts are illustrated by the Tenth Circuit opinion in *Sutton*,⁴⁴ where the court:

1. Required, in essence, that plaintiffs be actually substantially limited (1st prong) in order to establish a "regarded as" case; and
2. Required that the plaintiffs demonstrate that the employer regarded them to be disqualified from similar jobs by other employers.

Both of these requirements, often combined, constitute insurmountable obstacles for plaintiffs.⁴⁵ Since an employer is only concerned with the particular job it is offering, it is not likely to be thinking about other jobs the impaired individual could or could not obtain and certainly is not thinking about how the plaintiff's impairment affects other activities besides working. The only way to give meaning to the "regarded as" prong is to interpret the rejection from the job in question to signify the employer's view of the plaintiff's ability to perform the class of jobs to which the job in question belongs.

Yet, employers are being allowed to defend suits under the ADA by proving that other employers do not utilize the same discriminatory criteria as that employed by the defendant and that, therefore, the discriminatory criteria does not constitute a substantial barrier to employment.⁴⁶ In other

⁴⁴ The *Sutton* decision provides a more thorough analysis of the "regarded as" prong than *Murphy*.

⁴⁵ See e.g., *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (rejecting plaintiff's "regarded as" claim because he was not substantially limited in major life activity).

⁴⁶ See *Burgdorf* at 441, 456, n.234; see e.g., *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996). (In a case involving rejection as a fire fighter because of hemophilia, where the court refused to consider the policy of the city to require all EMT and paramedic positions to meet firefighting

words, the more arbitrary and prejudicial the physical or mental criteria, the more likely the employer will be able to escape review under the ADA.⁴⁷ This argument would be untenable in other areas of civil rights law, where proof of other employers' nondiscriminatory job criteria would be used as evidence of the defendant's discrimination.

The Tenth Circuit opinion in *Sutton* illustrates how both the infusing of first prong analysis in "regarded as" cases and requiring a plaintiff to demonstrate the employer's perception beyond the natural implications of the rejection itself undermines the "regarded as" prong. In determining whether United "regarded" plaintiffs as unable to do a class of jobs, the court immediately shifted its inquiry to the first prong analysis of whether plaintiffs' impairment actually substantially limited their employment in a "class of jobs". *Sutton* at 903-904. The Court then concluded that if the plaintiffs are not substantially limited in working in actuality, they also cannot be found to have been regarded as substantially limited. This judicial construction effectively repeals the third prong of the definition.

The court also improperly applies the "single job" exception in the EEOC regulations defining "substantially limited in working" to the "regarded as" analysis. Although the Tenth Circuit accepts plaintiffs' allegations that United rejected

standards in consideration of whether plaintiff was excluded from a "class of job" because there was no proof that other employers did the same thing.)

⁴⁷ The case which gave rise to the "class of jobs" analysis recognized that in "evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process," *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1100 (D. Hawaii 1980). The court in *E.E. Black* underscored the importance of a presumption of common usage of the discriminatory criteria. *Id.* Otherwise, according to the court, an employer using the "absolutely type of job qualification . . . would be rewarded if his reason for rejecting the applicant were ridiculous enough." *Id.*

them from all pilot jobs at United the court concludes that this rejection is not sufficient to demonstrate rejection from a "class of jobs," which would include not only global airlines, such as United, but all other types of carriers as well (national, commuter, regional, cargo/courier airlines). However, the court gives absolutely no indication as to how plaintiffs are to demonstrate whether or not United regarded them as able or unable to work for the other types of airlines. The court simply states that it cannot adopt a "reasoning [that] would imply that anyone who failed to obtain a single job because of a single requirement of employment could become a "disabled individual . . . This reading would stand the Act on its head." *Sutton* at 905.

As the Sixth Circuit stated in *Taylor v. United States Postal Service*, 946 F.2d 1214, 1218 (6th Cir. 1991),

. . . a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason?

In most cases, the plaintiff will only know that the employer rejected him or her because of an impairment. Absent contrary evidence, the rejection from the job in question must be viewed as a perception that the plaintiff is unable to perform the class of jobs of which the particular job is a part. For example, if an employer rejects an applicant for a teaching job because of an impairment, the applicant is regarded as unable to teach. Plaintiffs' allegation that there is nothing unique about the United pilot jobs should suffice to establish that United regarded plaintiffs (or all those with

uncorrected vision of 20/100 or worse) as unable to perform the class of jobs of piloting.⁴⁸

Moreover, since plaintiffs were rejected because of their *uncorrected* vision, United cannot claim that it did not regard them as substantially limited in seeing because they can wear glasses. It would be unfair to look at the "regarded as" prong with mitigating measures that the defendant refused to consider in the rejection.

The Tenth Circuit's results-oriented approach can perhaps be explained by the courts' fundamental misunderstanding of the significance of finding that plaintiffs were "regarded as" disabled under the ADA. Immediately after rejecting plaintiffs' "regarded as" claim, the court cited *Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996) for the proposition that accepting plaintiffs' claim would mean that "anyone could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual. . . ."

The fundamental misunderstanding revealed by this quote is the assumption that establishing *coverage* is sufficient to establish a *prima facie* case. As stated earlier, the coverage question is just the first prerequisite of a *prima facie* ADA case.⁴⁹ The plaintiff must also show that he or she is qualified to perform the essential functions of the job and that

⁴⁸ The Tenth Circuit references the EEOC's example that "an individual who cannot be a commercial pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working," 29 C.F.R. §1630, app. §1630.2(j) para. 12. This example is used to explain whether, under the first prong of the definition of disability, an individual is actually substantially limited in working. Again, as explained above, in a "regarded as" case the allegation that United rejected plaintiffs from all pilot positions with United must be interpreted to at least raise a factual issue that United regarded plaintiffs as unqualified for pilot jobs in general.

⁴⁹ See *infra*.

the rejection was based on disability. As the Supreme Court warned in *Arline*, 480 U.S. at 285, by excluding an impaired individual from coverage, the individual loses the opportunity to have the condition evaluated in light of medical evidence, thus making him or her "vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent."

Another insight into the Tenth Circuit's restrictive interpretation of coverage is revealed in the Court's statement that "[w]e refuse to construe the . . . The Act as a handout to those who are in fact capable of working in substantially similar jobs." *Sutton* at 906. Citing *Hileman v. City of Dallas*, 115 F.3d 352, 354 (5th Cir. 1997). Coverage under the ADA is not a hand-out. The fact that an individual *might* be able to find work elsewhere should not shield an employer from having its exclusionary medical criteria evaluated in light of objective medical evidence. As was emphasized time and time again in the legislative history of the ADA, "[b]y including the phrase 'qualified individual with a disability' the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. . . ." Senate Report at 26. "An employer may still devise physical and other job criteria and tests for a job so long as the criteria and tests are job related and consistent with business necessity." *Id.* at 27.

ADA plaintiffs want to work; they want to be tax-paying, contributing members of our society. Courts are accustomed to the term "disability" meaning "inability" in cases for benefits and tort awards. The ADA provides a new framework for the term disability. The third prong of the definition, in particular, is causing confusion because it uses the term "disabled" to describe people whose biggest limitation is the attitudes of others. *Amici*, current and former members of Congress, look to this Court to set forth the proper analytical framework for the lower courts, to give effect to Congressional intent to eliminate attitudinal barriers which limit the

opportunities of millions of Americans with a wide range of medical conditions.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Tenth Circuit should be reversed and the judgment of the Court of Appeals for the Ninth Circuit affirmed.

Dated: February 19, 1999

Respectfully submitted,

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Supreme Court, U.S.

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NO. 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,
Petitioner,
v.
UNITED PARCEL SERVICE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF OF AMICI CURIAE IN SUPPORT OF
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 97-1992

VAUGHN MURPHY, Petitioner

v.

UNITED PARCEL SERVICE, INC., Respondent.

STATEMENT OF AMICUS INTEREST

The Commonwealth of Massachusetts, the State of West Virginia and the undersigned __ amici states have a direct interest in the resolution of this case. First, the states seek to assure that their citizens obtain full protection and coverage under the Americans with Disabilities Act ("ADA"). Second, many of the amici states follow federal law in deciding employment-related disability issues under their state law and would likely be impacted by the decision in this case. Finally, the States have a strong public policy interest in this case because of their interest in: (1) promoting self-help of disabled persons without putting at risk their protection under the ADA, including their right to a reasonable accommodation; (2) assuring consistent coverage under the ADA, as a threshold matter, for persons with similar disabilities under state and federal law; and (3) providing a forum

for challenging automatic job disqualifications based on underlying medical conditions.

STATEMENT OF FACTS

The Commonwealth of Massachusetts, the State of West Virginia and the undersigned adopt the statement of facts set forth in the Petitioners' Briefs in *Murphy v. United Parcel Service, Inc.* No. 97-1992.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision, if affirmed, would have the deleterious effect of disadvantaging people with underlying impairments who engage in self-help, by denying them protection under the ADA, if their mitigating measures are successful. Such employees who have mitigated their impairments and would not be considered disabled under the ADA, therefore, would lose their right (1) to a legal forum to challenge job exclusions which are, in fact, based on the underlying impairment and (2) to request a reasonable accommodation under the Act.

ARGUMENT

I. INTRODUCTION

The Amici states are submitting this brief on the first issue before the Court which concerns the standard by which a

determination of "disability" is made under the first prong of its statutory definition. See 42 U.S.C. §12102(2)(A) (a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"). Specifically, the question is whether the "impairment" should be evaluated without considering the ameliorative effects of medication, prosthetic devices or other forms of assistance as required under an Equal Employment Opportunity Commission ("EEOC") Interpretive Guidance. See 29 C.F.R. Part 1630, App. §§1630.2(h) and 1630.2(j) (whether an individual has an "impairment" and whether that impairment "substantially limits a major life activity" should be made "on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices"). Or alternatively, as the Tenth Circuit has held in this case, that ameliorative measures should be considered when making the threshold determination of whether a person suffers from a disability.¹

¹ The amici states believe that the First Circuit conducted a particularly thorough and persuasive analysis of this issue in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857 (1st Cir. 1998), when it held that the EEOC Interpretive Guidance setting forth the "no mitigation measures" rule was a reasonable interpretation of the ADA. The court determined, first, that "the plain language of the ADA is not so clear and unambiguous" on the subject. Therefore, it looked to the legislative history of the Act, from which it concluded that it was "abundantly clear that Congress intended the analysis . . . to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures." *Id.* 136 F.3d at 859. The court

It is the view of the Amici that the EEOC's "no mitigating measures" Interpretive Guidance embodies the correct position. The use of mitigating measures does not eliminate the underlying disability, although it may reduce or control its effects in the short or long term. It is illogical and contrary to the public policy the states seek to promote to disadvantage employees who engage in successful self-help, by denying them the protection of the ADA, while at the same time providing ADA protection for similarly situated employees who do not ameliorate their underlying medical conditions.

For this reason, and others articulated below, this Brief of Amici is submitted.²

also took into consideration what it concluded were the broad remedial goals of Congress in enacting the Act. *Id.*, 136 F.3d at 861.

The majority of circuit courts that have considered this issue have reached the same result. *See Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995). *But see Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997); *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part).

² Many states interpret provisions of their state disability statutes by looking to federal court interpretations under the ADA. *See, e.g., Arnold* 136 F.3d at n.2 (the First Circuit, when

II. APPLYING THE EEOC'S "NO MITIGATING MEASURES" INTERPRETIVE GUIDANCE FOR DETERMINING WHETHER AN EMPLOYEE SUFFERS FROM A DISABILITY RESULTS IN CONSISTENT APPLICATION OF THE ADA, AS A THRESHOLD MATTER, TO EMPLOYEES WITH SIMILAR UNDERLYING MEDICAL CONDITIONS AND ALSO PROMOTES SOUND PUBLIC POLICY.

Under the Tenth Circuit's decision, which requires that the threshold question of disability be determined only after ameliorative measures are taken into consideration, people with disabilities are penalized for their diligent efforts to reduce the impact of their impairments on major life activities because they lose the protection of the ADA. The fundamental unfairness and deleterious impact of such a rule is demonstrated in *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997).

In that case, the plaintiff suffered from non-insulin dependent

interpreting the Maine Human Rights Act, concluded that because "the ADA has 'provided guidance to Maine courts in interpreting the state statute,'" [citations omitted], determination of ADA claim also resolves state claim); *Latch v. Southeastern Pennsylvania Trans. Auth.*, 984 F. Supp. 317 (E.D.Pa. 1997) (Pennsylvania courts look to the ADA in interpreting state's anti-discrimination statutes). *See also Woods v. Friction Material, Inc.*, 30 F.3d 255, 263 (1st Cir. 1994) (Massachusetts' highest court "may look to the interpretations of analogous federal statutes," [citation omitted], in interpreting state anti-discrimination statutes).

diabetes which, once it was diagnosed, he was able to control through a strict regimen of oral medication, rigorous monitoring of blood sugar levels, diet, exercise and proper rest. *Id.* at 761. In the absence of these mitigating measures, the plaintiff employee testified that his blood sugar level "fluctuated widely," resulting in a personality change that substantially limited his ability to work. *Id.*

The court in *Gilday*, with one judge dissenting, rejected the EEOC Interpretive Guidance. It concluded that while the plaintiff was "impaired" under the ADA, the question of whether the impairment amounted to a disability within the meaning of the ADA must be determined by taking into consideration any mitigating measures the plaintiff undertook to control his impairment. Since the plaintiff, through the strict regimen discussed above, could control his condition, he was not found to be "substantially limited" in the major life activity of working and, therefore, was not disabled under the ADA.

As a result of this ruling, an individual with the same general "impairment" as the plaintiff in *Gilday* -- non-insulin dependent diabetes which results in a personality change that affects the major life activity of working -- who does not adopt self-help measures, would likely be covered by the ADA even though he has been "unable to muster the self-discipline to follow his regimen." *Gilday*, 124 F.3d at 764 n.5 (Moore, J., dissenting). Whereas, the plaintiff in *Gilday*, who independently took the initiative and successfully brought his diabetes under control, would be denied such coverage. Such an approach not only discourages self-help, but also results in inconsistent application of the ADA -- as a threshold coverage matter -- to employees with similar underlying medical conditions.

Thus, in the case before this Court, the Tenth Circuit ruling would render contrary findings of ADA coverage for a plaintiff like Murphy who takes his hypertension medication and has controlled his underlying impairment and a plaintiff who suffers from the same underlying medical condition as Murphy but does not take his medications (either because he refuses or cannot afford them) or does not take them regularly as medically required. While the latter would be protected under the ADA, the former would not.

The First Circuit noted the illogic of this result in another diabetes case, *Arnold*, 136 F.3d at 863 n.7. In that case, the plaintiff suffered from type I insulin-dependent diabetes mellitus which required that he monitor his blood glucose levels throughout the day and give himself injections of insulin two to four times a day, keep constant attention to possible signs of hypoglycemia, and follow a strict diet and exercise regimen to control the disease. By these mitigating measures, the plaintiff was able to control the disease. *Id.* The First Circuit commented as follows:

That a person with a disability is able to use medical knowledge or technology to overcome many of the effects of his illness (in *Arnold's* case, by a continuing regimen of medicine, proper eating habits, and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination based on his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes

under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self-help.

Id. See also *Bragdon v. Abbott*, 524 U.S. ___, 118 S. Ct. 2196, 2206 (1998) (“[T]he disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable”); *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (“Individuals who need wheelchairs, artificial limbs, hearing aids and other prosthetic devices clearly have impairments that may substantially limit their major life activities. Neither as a matter of law nor of common sense would we say that they are not impaired or disabled because their prosthetic device happens to be exceptionally good.”).

Also, under the Tenth Circuit’s decision, an employee without insurance, who cannot afford treatment for an underlying medical condition, would be protected in the hiring process under the ADA. Once he was hired, however, and was insured under a company’s health plan and able to obtain treatment, he would no longer be considered “disabled” and would lose the protections of the ADA. Therefore, he could be fired on the basis of his disability without the ability to resort to the protections of the ADA. This interpretation of the ADA “would be inconsistent with the Act’s broad remedial purposes.” *Arnold*, 136 F.3d at 862. See also *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997).

The concern that applying the EEOC Interpretive Guidance (which requires that the threshold question of “disability” be determined without regard to mitigating measures) would result in coverage under the ADA of a larger number of Americans, is unpersuasive in light of clear Congressional intent. As the First Circuit noted, that is what Congress intended:

The very first finding Congress listed in the preamble to the Act is that “some 43,000,000 million Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.” 42 U.S.C. §12101(a)(1). It thus appears that Congress not only considered but actually intended that the ADA’s protections sweep broadly, covering a significant portion of the American populace.

Arnold, 136 F.3d. at 862.

III. THE TENTH CIRCUIT’S DECISION CREATES A CONUNDRUM FOR EMPLOYEES WHO ARE BARRED FROM JOBS BECAUSE OF THEIR UNDERLYING IMPAIRMENT, EVALUATED WITHOUT REFERENCE TO MITIGATING MEASURES, AND YET ARE UNABLE TO CHALLENGE THE LEGAL BASIS OF THE DISQUALIFICATION BECAUSE THEY ARE NOT DEEMED DISABLED UNDER THE ADA.

The decision of the Tenth Circuit in *Murphy* highlights the dilemma faced by employees whose disabilities are evaluated in

a mitigated state. The petitioner job applicant in *Murphy* was automatically disqualified from the position of mechanic at United Parcel Service, Inc. ("UPS") because he suffered from severe hypertension and failed to meet a Department of Transportation ("DOT") blood pressure standard. Therefore, he could not be qualified to operate a commercial motor vehicle. He was disqualified despite the fact that he had worked as a mechanic for Ryder Truck Rental for the past 22 years and was able to perform the job adequately.

Thus, the job applicant was barred by a DOT standard from the mechanic's job because of his underlying impairment of severe hypertension, which is evaluated in its unmitigated state. However, the Tenth Circuit concluded that Murphy was not "disabled" under the ADA -- a determination it made after considering the mitigating measures Murphy undertook, which effectively controlled the underlying impairment. As a disabled person, Murphy would have been able to litigate the legality of the DOT standard under the ADA (and whether it was properly interpreted and applied by his employer).³ Since he is not considered disabled, however, his employer's decision is insulated from review.

This is precisely the predicament the First Circuit in *Arnold*, 136 F.3d at 862, sought to avoid by applying the EEOC's

³ Apparently, there is some question as to whether the DOT regulation mandated disqualification of applicants with blood pressure in excess of 160/90 (since this standard is based in a DOT publication) or whether UPS's reliance on this regulation was misplaced and the company was in fact imposing its own requirement on applicants.

Interpretive Guidance to the threshold question of disability. The First Circuit stated:

Arnold's diabetes makes him just the type of person the ADA was designed to protect. He would have been hired by UPS but for his inability to get a commercial vehicle license, which was prevented only because he had diabetes (the underlying medical condition, without taking into account ameliorative treatments). But Arnold alleges that, with treatment, he can perform the job despite his impairment if UPS will reasonably accommodate him. This would ordinarily be a factual question on the merits for the court to determine. Yet, under UPS' and the district court's interpretation of the ADA, a person in this archetypical situation is not protected from discrimination by the ADA because he is not disabled and hence not even a proper plaintiff under the Act. According to UPS, in such circumstances, the trier of fact never gets to the merits of the alleged discrimination, or the "qualified individual" requirement, or of reasonable accommodation.

Id. at 862.

Under the Tenth Circuit's decision, employees who are barred from jobs for failure to meet impairment-based company policies, guidances or regulations have no legal recourse for challenging the basis of those policies, guidances or regulations. Permitting employees the opportunity to challenge the assumptions upon which their disqualifications are based is consistent with Congress's broad remedial goals in enacting the

⁴ The two plaintiff job applicants in the *Sutton* case, No. 97-1943, which is also before this Court, were automatically disqualified from positions as pilots for a major global air carrier because of a company policy that required applicants to have uncorrected vision of 20/100 or better—despite the fact that the Federal Aviation Agency had awarded both applicants first class medical certificates under which they had long been employees as commercial pilots for commuter airlines. As in *Murphy*, their underlying impairment was evaluated without reference to mitigating measures and their legal blindness automatically disqualified them under a company policy from the pilot position.

While vision cases may present a different standard of analysis since vision is easily correctable with eyeglasses or contacts lenses, *see Arnold*, 136 F.3d at 866 n.10, including such plaintiffs within the scope of the ADA, by evaluating the vision impairment in an unmitigated state, will at least permit an employee the opportunity to test the legitimacy of the company policy under the ADA. If the *Suttons* were deemed disabled in their unmitigated state, their employer could still assert that: (1) they are unable to perform an essential function of the job with or without a reasonable accommodation; (2) any accommodation requested would create an undue hardship; or (3) public safety justified the blanket disqualification. 42 U.S.C. §§12111 and 12113. *See also Arnold*, 136 F.3d at 861.

IV. PROTECTION UNDER THE ADA IS ESSENTIAL FOR EMPLOYEES WITH UNDERLYING IMPAIRMENTS, EVEN WHEN THE IMPAIRMENT IS PARTLY OR FULLY CONTROLLED BY MITIGATING MEASURES, SO THAT SUCH EMPLOYEES ARE ENTITLED TO A REASONABLE ACCOMMODATION SHOULD THE NEED ARISE.

Another anomalous result that flows from the Tenth Circuit decision is that people who would otherwise be covered by the ADA for an underlying impairment, but for their ameliorative efforts, are not entitled to even the most minor accommodation. The dissent in *Gilday*, 124 F.3d at 764 (Moore, J. dissenting), provided an example which highlights this problem. It noted that a person with a heart condition who ameliorates the condition by obtaining a pacemaker will be refused protection under the ADA because the mitigation measure successfully controlled the underlying condition. That person, therefore, will not be entitled to any reasonable accommodation -- even one as simple as moving a desk away from a microwave oven to avoid disrupting the medical device.

There are countless examples of the kinds of accommodations that people with a "controlled" impairment might need. First, "ameliorating" the impairment itself may require absences from work -- for example, to attend doctor's appointments, physical therapy, or to obtain testing. Additionally, the mitigating measures may take up work time where, for

example, an employee must take medications on a prescribed schedule or undergo self-testing of the underlying condition.

Also, a controlled condition may not remain permanently controlled. The *Harris* case demonstrates the dilemma an employee can face in this circumstance. In that case, the plaintiff employee suffered from Graves' disease, an endocrine disorder which affected the thyroid gland. She had been diagnosed with the disease twenty years previously and prescribed medication which controlled the condition -- with one exception. In her third year of employment as a comptroller with the defendant company, Harris experienced a "panic attack" due to an overdose in her medication. The overdose occurred because of a change in the manufacturer of the drug. She was hospitalized for eight days in a psychiatric ward and out on sick leave for approximately two months. *Harris*, 102 F.3d at 518.

While Harris was on sick leave, her employer hired another individual to become comptroller. When she returned to work, Harris was informed that she would need to seek other employment. *Id.* According to papers submitted on summary judgment, the plaintiff's employer stated that he "*felt that the company was put in jeopardy, at a disadvantage due to her type [of] illness.*" *Id.*, 102 F.3d at 523 (italics in original).

The employee filed an ADA claim against her employer which was dismissed by the district court on summary judgment. The district court held that the employee's impairment did not rise to the level of a disability. *Id.*, 102 F.3d at 519. It reached this decision by taking mitigating measures into consideration and concluded that, except for this one instance, the employee's impairment was controlled. Thus, under this approach (which is the same as the Tenth Circuit's), Harris would be barred from

challenging her employer's actions under the ADA, even though they were clearly based on her medical condition. Moreover, the plaintiff would not be allowed to assert that her two month sick leave was a reasonable accommodation of her disability.

The Eleventh Circuit reversed the decision of the district court after applying the EEOC Interpretive Guidance and concluded that Graves' disease (which in its unmedicated state would lead to coma and death) was a disability within the meaning of the ADA, and the employee's legal action could go forward. *Id.*, 102 F.3d at 521.

Thus, symptoms may arise from the ameliorating medications, or when the existing medications cease to be as effective as in the past, and can readily result in inconsistent control of the impairment. "[T]he manifested symptoms of an 'underlying disability may be episodic or temporary in nature while the impairment itself is both chronic and permanent.'" *Harris v. H&W Contracting, Company*, 102 F.3d at 520. For this reason, an employee who has an underlying impairment which in its unmitigated state "substantially limit[s] one or more of the major life activities" of that individual; 42 U.S.C. §12102(2)(A); should be covered as a disabled person under the ADA.⁵

⁵ An employee is entitled to a reasonable accommodation only if deemed to be disabled under the first prong of the ADA definition. See *Gilday*, 124 F.3d at 764 n. 4. (Moore, J. dissenting). Thus, providing ADA coverage under the third prong ("regarded as" disabled) for employees who control their underlying impairments through mitigating measures would be inadequate. An employee who is deemed "regarded as" disabled is not entitled to an accommodation. *Id.*

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the Court reverse the Tenth Circuit decision in this case.

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No. 97 - 1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,

v.

Petitioner,

UNITED PARCEL SERVICE, INC.,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**BRIEF AMICUS CURIAE OF THE NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Should the determination of whether Murphy's severe, Stage IV hypertension is a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without considering his use of mitigating measures such as medication?

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INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.¹ NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1997); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S.Ct. 1466 (1997); *Cleveland v. Policy Management Systems Corp.*, No. 97-1008, *cert. granted*, ___ U.S. ___, 67 U.S.L.W. 3228 (U.S. Oct. 5, 1998); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 748 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

¹ The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. With the exception that counsel for petitioner, Kirk W. Lowry, is a member of NELA and, as such, pays general membership dues, no persons other than the *Amicus Curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA members have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect and defend the interests of employees involved in workplace disputes, including workers who are involved in ADA litigation.

This case presents an opportunity to clarify that the question of whether an individual has a "disability" should be made without considering the individual's use of mitigating measures such as medications, prosthetic devices and auxiliary aids. NELA submits this brief to urge the Court to conclude that the individual's use of mitigating measures should not be considered when determining whether the person has a substantial limitation of a major life activity.

STATEMENT OF THE CASE

Vaughn Murphy has had severely high blood pressure for the past 35 years. When his condition is not medicated, his blood pressure runs approximately 250/160. Even when medicated, Murphy's ability to lift, eat, hear, see, exercise and run are adversely affected. When Murphy tries to reduce his blood pressure to normal levels through medication, Murphy suffers severe side effects, including loss of memory, impotence, lack of sleep and stuttering. If he reduces his blood pressure to below 160/90, Murphy is largely unable to function, according to his physician.

Murphy worked as a mechanic for 22 years. He used levers and devices to lift heavy objects, avoided heavy work, running or performing work above his head. He was under doctor's orders not to hold a job which involved heavy lifting of 200 pounds or more.

In August, 1994, Murphy applied for a mechanic position with respondent, United Parcel Service ("UPS"). UPS requires its mechanics to have a commercial drivers license and a Department of Transportation ("DOT") health card. Murphy had a commercial drivers license. During a physical examination by a DOT examiner which he took during the application process, Murphy's blood pressure was 186/124. The DOT examiner issued Murphy a DOT health card pursuant to DOT regulations. UPS hired Murphy as a mechanic on August 18, 1994.

In mid-September, 1994, a UPS company nurse who reviewed Murphy's file discovered Murphy's record of having high blood pressure. Both the nurse and UPS stated that DOT regulations automatically excluded anyone with blood pressure exceeding 160/90 from holding a commercial drivers license. On September 26, 1994, Murphy's blood pressure was tested again but was still above DOT's standard of 160/90. On October 5, 1994, UPS terminated Murphy's employment.

Murphy filed suit against UPS under the ADA. To pursue his ADA claim, Murphy initially must show that he was an "individual with a disability" as defined by the ADA. This will require Murphy to show that he has a substantial limitation of one or more of his major life activities, that he has a record of such a disability, or is "regarded" by UPS having such a disability. See 42 U.S.C. §12102(2)(A), (B) and (C).

The District Court granted UPS' Motion for Summary Judgment. *Murphy v. United Parcel Service, Inc.*, 946 F.Supp. 872 (D. Kan. 1996). The court first determined that Murphy's severe hypertension should be examined in its medicated state when determining whether he has a "disability" under the ADA. *Id.* at 880-81. The court then concluded that no reasonable factfinder could conclude that Murphy's high blood pressure in a medicated state substantially limited him in any major life activities. *Id.* at 881-82. The District Court also rejected Murphy's claim that UPS "regarded" him as disabled, reasoning that UPS only regarded him as being not certifiable under DOT regulations. *Id.*

The Tenth Circuit affirmed the District Court's decision granting summary judgment. Based on its decision in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999 WL 5326 (U.S., Jan. 8, 1999), the Tenth Circuit concluded that the first prong of the ADA's definition of disability required consideration of mitigating measures, and, as a matter of law, Murphy's severe high blood pressure in its medicated state did not substantially limit him in any major life activities. The Tenth Circuit also affirmed the District Court's decision that Murphy failed to show that UPS "regarded" him as having a disability under the ADA, reasoning that it fired Murphy because his blood pressured exceeded the DOT's requirement for drivers of commercial vehicles, not because of an unsubstantiated fear that Murphy would have a heart attack or a stroke.

SUMMARY OF THE ARGUMENT

The ADA was adopted by Congress in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12182(b)(1). Many of those individuals with disabilities often use mitigating measures, such as medications, prosthetic devices or auxiliary aids to accommodate their disabilities.

The ADA is a remedial statute which must be construed broadly to effectuate its purpose. Some courts have narrowly interpreted the term "disability" by ruling that an individual's use of a mitigating measure should be taken into consideration when determining whether the individual is covered under the ADA. However, eight of the ten Circuit Courts of Appeals that have addressed the question have rejected that position. Compare *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Kirkenberg v. Albertson's, Inc.*, 143 F.3d 1228, 1232-33 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857-65 (1st Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996); with *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999

WL 5326 (U.S. Jan. 8, 1999); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997).² *Amicus* asks this Court to embrace the views of the overwhelming number of courts that have broadly interpreted the statute to exclude consideration of mitigating measures.

The ADA's definition of disability is derived from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B). Courts interpreting the definition of "handicapped individual" under the Rehabilitation Act have routinely excluded consideration of mitigating measures. Both the ADA's legislative history and the Equal Employment Opportunity Commission's ("EEOC") Interpretive Guidance also state that mitigating measures should not be considered when determining whether an individual is substantially limited in a major life activity and therefore covered under the ADA. Interpreting the ADA to exclude consideration of mitigating measures is consistent with the statute's broad remedial purposes.

² In *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996), the Fifth Circuit stated in *dicta* that an individual's use of mitigating measures should be considered when determining whether the individual is substantially limited in a major life activity. *Id.* at 191-92 n. 3. However, the Fifth Circuit abandoned that position in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 n. 5 (5th Cir. 1998).

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED WHEN DETERMINING WHETHER AN INDIVIDUAL HAS A DISABILITY UNDER THE FIRST PRONG OF THE ADA'S DEFINITION OF DISABILITY.

A. Mitigating Measures Were Not Considered Under the Rehabilitation Act.

The ADA defines the term "disability" as:

- (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (b) a record of such an impairment; or
- (c) being regarded as having such an impairment.

42 U.S.C. §12102(2). The ADA's definition of disability is derived "almost verbatim" from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B); *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2202 (1998). The ADA provides at 42 U.S.C. §12201(a) that:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards used under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by the Federal agencies pursuant to such title.

In *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196 (1998), this Court interpreted that language to "require [] us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 2202.

The Rehabilitation Act's regulations define "physical or mental impairment" as:

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. §84.3(j)(2)(i) (1997).

The Rehabilitation Act's regulations contain a representative list of "major life activities" and define the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3(j)(2)(ii) (1997). The list of major life activities "is illustrative, not exhaustive." *Bragdon*, 118 S.Ct. at 2205 (concluding that reproduction is a major life activity even though not specifically enumerated in the regulations).

This Court observed in *Bragdon* that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Id.* at 2208 (citations omitted). Courts have never considered the use of mitigating measures when interpreting the definition of "handicapped" under the Rehabilitation Act and its regulations. Therefore, this Court should similarly exclude consideration of the use of mitigating measures

when analyzing whether the individual is substantially limited in one or more major life activities.

In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), for example, the Ninth Circuit held that epilepsy was a handicap even though it was controlled by medication. *Id.* at 574. In *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991), the Second Circuit stated that "[w]e are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as being substantially limited in their ability to care for themselves." *Id.* at 641. The First Circuit concluded in *Cook v. State of Rhode Island Dep't of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir. 1993) that an individual with morbid obesity had a handicap under the Rehabilitation Act, even though she could treat the manifestations of her dysfunctional metabolism through fasting or undereating. *Id.* at 24.

Although the plaintiff's diabetes, carpal tunnel syndrome and depression were controllable with medication, the court in *Miles v. General Services Administration*, 1995 WL 766013 (E.D. Pa. 1995) concluded that the plaintiff was handicapped within the meaning of the Rehabilitation Act. The court in *Liff v. Secretary of Transportation*, 1994 WL 579912 (D.D.C. 1994) rejected the defendant's argument that the plaintiff was not "handicapped" because her depression was controlled by medication, reasoning that "Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regard to medication." The court relied, in part, on the language and purpose of the Rehabilitation Act in *Fal-*

lacaro v. Richardson, 964 F.Supp. 87 (D.D.C. 1997) for its conclusion that a person who was totally blind was handicapped under the statute, even though she had 20/20 vision with corrective lenses.³

In *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995), the Tenth Circuit observed that "Congress intended that the relevant case law developed under the Rehabilitation Act be generally be applicable to the term 'disability' under the ADA." *Id.* at 897 (citing 29 C.F.R. §1630, App. §1630.2(g)). This Court should reject the Tenth Circuit's attempt in the instant case to disregard its own admonition and construe the ADA's definition of disability more narrowly than the Rehabilitation Act definition of the term of "handicap." Because the Rehabilitation Act's definition of "handicap" did not require that mitigating measures be considered, repeating the same definition of "disability" under the ADA clarified that Congress intended to incorporate that interpretation into the ADA as well.

³ See also, e.g., *Strathie v. Dep't of Transportation*, 716 F.2d 227, 228-29 (3d Cir. 1983) (undisputed that individual with a hearing impairment was handicapped under the Rehabilitation Act even though with the use of a hearing aid his hearing was corrected to an acceptable level under relevant state law); *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (accepting without discussion that individual with insulin-dependent diabetes was handicapped under the Rehabilitation Act).

B. The ADA's Legislative History Demonstrates that Mitigating Measures Should Not Be Considered When Determining Whether an Individual Has a Disability.

The starting point for interpreting a statute "is the language of the statute itself." *Arnold v. United Parcel Service*, 136 F.3d 854, 857 (1st Cir. 1998) (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). Most courts that have examined the question have concluded that the ADA does not clearly state whether mitigating measures should be considered when examining whether an individual has a substantial impairment of one or more major life activities. See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 467 (5th Cir. 1998); *Arnold v. United Parcel Service*, 136 F.3d 854, 859 (1st Cir. 1998) ("A reasonable person could interpret the plain statutory language to required an evaluation either before or after ameliorative treatment."); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

If a statute's text is not absolutely clear, the next source for guidance to ascertain the statute's meaning is its legislative history. *Arnold*, 136 F.3d at 858. The ADA's legislative history plainly demonstrates that mitigating measures should not be considered when determining whether an individual has a substantial impairment of one or more major life activities.

In describing the first prong of the definition of disability, the House Judiciary Committee Report states that:

The impairment should be assessed without considering whether mitigating measures, such as auxilia-

ry aids or reasonable accommodations, would result in less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment are controllable by medication. H.R. Rep. No. 101-485 (III) at 28, reprinted in 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

Similarly, the House's Education and Labor Committee Report provides that:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. H.R. Rep. No. 101-485 (II) at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report").

The Senate Report also provides that determining whether a person has a disability under the ADA "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S.Rep. No. 101-116 at 23 (1989) ("Senate Report").

The Senate Report does contain language which some courts have interpreted to be inconsistent with the position that the question of whether a condition is covered under the "first prong" of the definition of dis-

ability excludes consideration of mitigating measures.⁴ See e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998). While discussing the third prong of the definition of disability, the Senate Report states that:

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Senate Report at 24.

In *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998), the First Circuit concluded that these two passages from the Senate Report were not inconsistent, reasoning that "these passages can be easily squared by recognizing that an individual could have a 'disability' under *both* prong one (having an impairment that substantially limits a major life activity) *and* prong three ('regarded as' having such an impairment) at the same time; one does not preclude the other." *Id.* at 860 (emphasis in original). Moreover, the House Reports, which came after the Senate Reports, did not incor-

⁴ The "first prong" of the definition of disability refers to whether the individual has a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(2)(A). The "third prong" of the definition of disability refers to someone who does not have a "disability" under the first prong of the definition but is "regarded" by the employer as having such an impairment. 42 U.S.C. §12102(2)(C).

porate the Senate Report's discussion of medicated conditions under the third prong of the disability of definition. That omission led the Fifth Circuit to conclude that:

Given that much of the structure and language of the House Report was borrowed from the Senate Report, it seems that the House Committees were aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 468 (5th Cir. 1998).⁵

C. The EEOC's Interpretive Guidance Also States that Mitigating Measures Should Not Be Considered When Determining Whether an Impairment Substantially Limits a Major Life Activity.

If the plain language and legislative history do not clarify the statute's meaning, a court must defer to the interpretation of the agency charged with enforcing the statute, provided the interpretation "flows rationally from a permissible construction of the statute." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (citations omitted). The ADA authorized the EEOC to issue regulations to enforce the statute. 42 U.S.C. §12116 (1994). The EEOC exercised that author-

⁵ The Fifth Circuit also observed that "... the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

ity by promulgating regulations and attaching to those regulations guidelines for interpreting the ADA. *Id.* at 863. Although the EEOC's interpretive guidelines are not, like regulations, controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly result for guidance." *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2207 (1998) (citation omitted).⁶

In its Interpretive Guidance, the EEOC states that the existence of an impairment must be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(h). The guidelines later elaborate that the "determination of whether an individual is substantially limited in a major life activity" must be made "without regard to mitigating measures such as medicines or assistive or prosthetic devices." 29 C.F.R. pt. 1603 App. §1630.2(j).⁷ The EEOC's Interpretive Guidance also provides that:

An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable

⁶ In *Bragdon*, this Court looked to the EEOC's pronouncements for guidance in concluding that an individual's asymptomatic HIV disease was a substantial limitation of the major life activity of reproduction. *Id.* at 220.

⁷ The United States Department of Justice ("DOJ"), which enforces the ADA's prohibition of disability discrimination in employment in state and local government entities, has also stated that "disability should be assessed without regard to the availability of mitigating measures." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998) (quoting 28 C.F.R. Part 35, App. A §35.104).

to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. App. §1630.2(j).

This Court has held that an agency's interpretation of a statute it administers "should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984)). There is no conflict between the EEOC's interpretive guidance and either the statute or its legislative history. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996). Rather, "[t]he EEOC's interpretation is not merely 'permissible'; it is entirely consistent with the ADA's legislative history and broad remedial purposes." *Arnold*, 136 F.3d at 864.

D. Interpreting the First Prong of the ADA's Definition of Disability to Exclude Consideration of Mitigating Measures Is Consistent with the Statute's Broad Remedial Purpose.

When construing a statute, a court must "interpret the words of [the statute] in light of the purposes Congress sought to serve." *Arnold v. United Parcel Services, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (citations omitted). The ADA is a "broad remedial statute." *Penny v. United Parcel Service, Inc.*, 128 F.3d 408, 414

(6th Cir. 1997). Remedial legislation like the ADA "should be construed broadly to effectuate its purpose." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998); see also *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (observing that the Federal Rehabilitation Act and its regulations should be interpreted broadly).

In the employment discrimination arena, the ADA's fundamental purpose is "to protect individuals who have an underlying medical condition or other limiting impairment, but who *are* in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original) (citations omitted). In *Arnold*, the First Circuit concluded that "[c]onceptually, it seems more consistent with Congress' broad remedial goals, and it also makes more sense, to interpret the words 'individual with a disability' more broadly, so the Act's coverage protects more types of people against discrimination." 136 F.3d at 861.⁸ The Ninth Circuit reached the same conclusion in *Kirkenburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998), cert. granted, ___ U.S. ___, No. 98-591, 1999 WL 5332 (1999), reasoning that the ADA "was drafted in broad language in order to protect a large class of physically

⁸ The *Arnold* court's interpretation mirrors this Court's observation in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) that when interpreting the definition of "handicap" under the Federal Rehabilitation Act "a broad definition, one not limited to the so-called 'traditional handicaps,' is inherent in the statutory definition." *Id.* at 280 n. 5.

impaired individuals from unwanted discrimination—it was not drafted narrowly to protect only those with the most severe disabilities.” *Id.* at 1233. Employers are not jeopardized by a broad interpretation of the term “disability” because individuals seeking protection under the statute must still be “qualified” to perform the essential functions of the job. 42 U.S.C. §§12111(8), 12112(a) (1994); see *Kirkenburg*, 143 F.3d at 1233; *Arnold*, 136 F.3d at 861-62.

II. THE ADA SHOULD NOT BE INTERPRETED IN A MANNER THAT WOULD DISCOURAGE INDIVIDUALS FROM ATTEMPTING TO CONTROL THEIR IMPAIRMENTS.

In *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998), the court stated that concluding that Arnold’s diabetes was not covered under the prong of the ADA’s definition of disability would provide him with a disincentive to controlling his impairment, reasoning that:

UPS’s interpretation could very well produce results antithetical to its expressed concerns and to the Act’s attempt to take such concerns into account that a person with a disability is able to use medical knowledge and technology to overcome many of the effects of his illness (in Arnold’s case, by a continuing regimen of medicine, proper eating habits and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination because of his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes

under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self help.

Arnold, 136 F.3d at 863 n. 7.

Endorsing the Tenth Circuit’s position on mitigating measures would not merely deter individuals from taking advantage of medical knowledge and technology. Rather, it would also deter individuals from developing “self-accommodations” for their impairment. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998), for example, the Court held that a police officer, blinded in one eye, was disabled under the first prong of the ADA’s definition of disability even though he had developed “subconscious adjustments” which enabled him to compensate for his limitations. *Id.* at 627. According to the Eighth Circuit, Doane’s “brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments should not take him outside the protective provisions of the ADA.” *Id.* at 627-28. Similarly, the plaintiff in *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), had a learning and reading impairment which significantly restricted her ability to timely identify and decipher the written word. *Id.* at 329. Dr. Bartlett developed “self-accommodations” which improved her ability to spell and her performance on word identity and work attack tests. *Id.* at 326. The Second Circuit concluded that “[h]er history of

self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population 'do not take [her] outside the protective provisions of the ADA.'" *Id.* at 329 (quoting *Doane*).

An individual who elects not to use an available mitigating measure because it would result in exclusion from the ADA's coverage is still placed in a precarious position because they may no longer be a "qualified" individual with a disability, 42 U.S.C. §12112(8), as defined by the ADA. In *Siefkin v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), for example, the defendant hired Siefkin, an individual with diabetes, as a probationary police officer, believing that he "could monitor his medical condition sufficiently to allow him to perform the duties of a police officer." *Id.* at 666. However, he failed to monitor his diabetes properly on one occasion and suffered a diabetic reaction while on duty driving a patrol car. *Id.* at 665. The employer terminated him and refused to give him a second chance to show that he could control his diabetes. *Id.* at 665, 666-67. The Seventh Circuit upheld the district court's dismissal of the case for failure to state a claim, reasoning that the plaintiff was fired because he failed to control a controllable disease. The Eighth Circuit reached the same conclusion in *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). Despite Burrough's assurance that he could keep his diabetes under control, he twice suffered a severe diabetic episode due to poor timing of his meals and activities which rendered him unable to perform his job as a police officer. The Eighth Circuit, relying on *Siefkin*, upheld the District Court's dismissal of his ADA claim, reasoning that

it was legitimate for the city to expect and require its patrol officers to be functional and alert at all times while on duty. *Id.* at 507. As the facts in both *Siefkin* and *Burroughs* illustrate, interpreting the ADA in a manner that discourages individuals from controlling their impairments could also jeopardize public safety.

CONCLUSION

The judgment of the Court of Appeals for the Tenth Circuit should be reversed and the case remanded to the District Court for a full hearing on its merits.

Respectfully submitted,

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October Term, 1998

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v.

UNITED PARCEL SERVICE, INC., Respondent

On Writ of Certiorari to the
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BRIEF OF *AMICUS CURIAE*
AMERICAN DIABETES ASSOCIATION
IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PETITIONER¹

¹ Pursuant to Rule 37.6, only counsel for *Amicus* American Diabetes Association authored this brief. Only *Amicus* made monetary contribution to the preparation and submission of this brief.

INTRODUCTORY STATEMENT

Whatever definition of "impairment" and "disability" the Court uses in this case will directly and significantly affect the legal rights and remedies of over 16,000,000 Americans with diabetes. This case will determine whether the Americans With Disabilities Act ("ADA") has the broad, remedial purpose intended by Congress and needed by all Americans with disabilities.

For Americans with disabilities, there are certain critical criteria for creating and applying a definition of an "impairment" which qualifies as a "disability" to be protected by the ADA. In understanding such criteria, it is helpful to consider, as Shakespeare so provocatively stated:

What's in a name? That which we
call a rose by any other name would
smell as sweet.²

Or, as the more pithy Gertrude Stein declared:
Rose is a Rose is a Rose is a Rose.³

² Shakespeare, William, *Romeo & Juliet*, Act II, Scene 2, Line 43 (1595).

³ Stein, Gertrude, *Sacred Emily*, The Oxford Book of American Light Verse, Oxford University Press, (1979) p. 286.

For this case, the question asked by millions of Americans living with disabilities is: When is a disability a "disability"? This question focuses on 42 U.S.C. § 12102(2)(A) or so-called "prong one" of the definition of "disability" under the ADA. At issue in this case is whether a disease should be evaluated as a "disability" in its treated or untreated condition.

INTEREST OF *AMICUS CURIAE*

How this Court handles hypertension in this case will directly influence how other courts handle diabetes regarding eligibility to be a qualifying "disability" under the ADA. Diabetes, like hypertension, is a chronic, non-curable disease for which the risks and complications of treatment are as potentially disabling as the risks and complications of the disease.⁴

The American Diabetes Association ("Association") is the nation's largest, oldest, most prominent, non-profit, voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all

⁴ Appendix to Petition for a Writ of Certiorari ("Pet.App."), pp. 13a & 16a.

people affected by diabetes.

The Association is made up of over 375,000 general members, over 16,000 health professional members, and over 3,000,000 contributors. The Association creates and maintains the most authoritative and widely-followed clinical practice recommendations, guidelines and standards for the treatment of diabetes.⁵ The Association is responsible for the most authoritative and comprehensive publications concerning the treatment of diabetes and developments in diabetes research.⁶

Among the Association's principal concerns is the fair treatment of individuals with diabetes in employment situations. The Association advocates the following policy:

Diabetes as such should not be a cause of

5 American Diabetes Association Position Statement: Standards of Medical Care for Patients with Diabetes Mellitus, *Diabetes Care*: 22:S32 (1999).

6 The Association publishes five professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); (2) *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); (4) *Diabetes Reviews* (invited reviews on selected topics for research-oriented health professionals); and, (5) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

discriminating against any person in employment. People with diabetes should be individually considered for employment, weighing such factors as the requirement or hazards of the specific job, and the individual's medical condition and treatment regimen (diet, oral hypoglycemic agents and insulin). Any person with diabetes, whether insulin-dependent or non-insulin-dependent, should be eligible for any employment for which he or she is otherwise qualified.⁷

Consistent with this policy, the Association has participated as *amicus curiae* in cases in the U. S. Supreme Court, many Circuit Courts of Appeal and a number of District Courts.

Presently, there are over 16,000,000 Americans with diabetes, including about 4,000,000 individuals who take insulin to treat their diabetes.⁸ Americans with diabetes, whether or not they take insulin, face serious health risks and complications including heart disease, stroke,

7 American Diabetes Association Employment Policy Statement (1984).

8 *Diabetes in America* (2d Ed.), National Institutes of Health (NIH Publication No. 95-1468) (1995), "Summary," Ch. 1, pg. 1.

blindness, kidney disease, nerve disease, amputation and difficult to control infection.⁹ The life-long medical and economic burden for individuals with diabetes is progressive, permanent and enormous. Diabetes is a serious, widespread and expensive national health problem.¹⁰

The Association knows through long experience that employers commonly restrict employment opportunities for individuals with diabetes and, in particular, for those who take insulin to treat their diabetes. Such restrictions are based on prejudices, stereotypes, unfounded fears and misinformation concerning diabetes and insulin in the workplace.¹¹ The Association is an advocate for employees and a resource of information for employers to understand that individuals with diabetes, whether or not they take insulin,

9 American Diabetes Association Position Statement: Standards of Medical Care for Patients with Diabetes Mellitus, *Diabetes Care* 22:S32 (1999).

10 In 1979, \$77.7 billion, i.e., 8% of all expenditures for health services in U.S., or \$10,071 per capita, compared with \$2,669 for individuals without diabetes. *Economic Consequences of Diabetes Mellitus in the U.S. in 1997*, American Diabetes Association (1998) pp. 9-12.

11 American Diabetes Association Position Statement: Hypoglycemia and Employment/Licensure, *Diabetes Care* 22:S103 (1999).

can be qualified, productive and safe workers in a wide range of employment situations for a broad spectrum of jobs. Indeed, employees with diabetes are often superior workers because of their appreciation, awareness and concern about safety in the workplace.

It is from this context that this *amicus* urges the Court in this case to create and apply a definition for "impairment" which is consistent with the broad, remedial purpose of the ADA. Americans living with disabilities are entitled to full and complete employment opportunities and to receive every reasonable opportunity to be productive, contributing and participating citizens. The definition of "impairment" fashioned in this case will have a significant impact on the 16,000,000 Americans with diabetes represented by the Association.

Additionally, this case involves an "impairment" (i.e. hypertension) which is similar to diabetes. Both diseases are not curable and are treated with medications which cause new and different medical problems. For both diseases treatment focuses on the symptoms of the underlying diseases which are physiological and metabolic in nature. The definition of "impairment" used in this case for hypertension will be used by other courts to determine if diabetes is a

qualifying "disability" under the ADA.

BACKGROUND ABOUT DIABETES¹²

Diabetes treated with insulin is similar to the hypertension afflicting Vaughn Murphy in this case. A brief, basic primer about diabetes as a non-curable, progressive disease will help frame the factual considerations necessary for an appropriate definition of "impairment" under the ADA.

Diabetes is a chronic disease involving the uncontrolled fluctuation of an individual's blood sugar level. Diabetes is physiologically caused by either the failure of the beta cells of the pancreas to produce enough insulin for normal carbohydrate, protein and fat metabolism or the failure of the body to effectively utilize the insulin that is produced.

Insulin is **not** a cure for diabetes but rather only a tool to help regulate an individual's blood sugar level. Insulin is a hormone that serves to transport sugar from the bloodstream into the

¹² See generally: *Bombrys v. City of Toledo*, 849 F.Supp 1210, 1213-1214 (N.D. Ohio 1993) and Bayler, *Dulling A Needle: Analyzing Federal Employment Restrictions on People With Insulin-Dependent Diabetes*, 67 Ind. L.J. 1067, 1068-1074 (1992).

cells of the body where it is metabolized. Without insulin the sugar stays in the bloodstream where the kidneys attempt to eliminate it through increased urine production. If this increased urine production is not slowed by insulin, an individual with diabetes will suffer many disabling symptoms. However, too much insulin causes too much sugar to cross the cell membranes resulting in abnormally low blood sugar levels from which an individual will suffer many new and different disabling symptoms.

Untreated diabetes will cause high blood sugar (hyperglycemia) whereas diabetes treated with too much insulin will result in low blood sugar (hypoglycemia). The goal of treatment is to try to balance the blood sugar level within a safe range, *i.e.* neither too low (to avoid hypoglycemia) nor too high (to avoid hyperglycemia). Regardless, the blood sugar levels for individuals with diabetes rise and fall day by day, and often hour by hour, as a result of a variety of external circumstances including the use and amount of insulin, use of oral medications, diet, exercise, stress, illness and infection.¹³

Whether treated or untreated individuals

¹³ *Medical Management of Type 1 Diabetes* (3d Ed.), American Diabetes Association (1998), pg. 51 *et. seq.*

with diabetes suffer many serious, progressive health complications which substantially limit many of life's major activities. There is a "high misery index" for an individual with diabetes: that individual has a 15 year shorter life expectancy than someone without diabetes;¹⁴ that individual is 2 to 4 times more likely to get heart disease, 2.5 times more likely to have a stroke, 4 times more likely to become blind, and 20 times more likely to get end-stage renal disease (kidney failure). An individual with diabetes is at a substantial higher risk for difficult to control infections and diabetes is the leading cause of adult blindness and non-traumatic amputations.

For an individual with diabetes who uses insulin (approximately 4,000,000 Americans) failure to take insulin can result in severe, acute medical problems and death in the short term.¹⁵ Insulin is used to help treat the symptoms of diabetes and try to lessen the acute and chronic complications from diabetes. However, the use of insulin creates other medical risks and problems

14 *Diabetes in America, supra*, "Mortality in Insulin-Dependent Diabetes," Ch.10, pp.221, 224-228 & "Summary", Ch.1, pg.4.

15 American Diabetes Association Position Statement: Insulin Administration, *Diabetes Care* 22:S83 (1999); Medical Management of Type 1 Diabetes, *supra*, pp. 51 & 55.

(i.e. hypoglycemia or insulin reaction) that lead to new and different limitations on many of life's major activities. Low blood sugar (hypoglycemia) leads to a variety of problems and symptoms ranging from tremors, palpitations and sweating through confusion, drowsiness, and mood changes to unresponsiveness, unconsciousness or convulsions.¹⁶

While elevated blood sugar level is of some concern because of long-term side-effects, the real danger is low blood sugar level caused by too much insulin. Hazardous side-effects associated with low blood sugar levels occur more quickly, more frequently and with more suddenness than do the effects of high blood sugar levels.¹⁷

As with many diseases which are disabling, treatment of diabetes with insulin has medical risks that can be more acute and more dangerous than the underlying disease. Diabetes treated with insulin has higher acute health risks while diabetes without insulin has higher chronic health risks, but both have many of the same health risks. Diabetes, whether treated or untreated, is an "impairment" which substantially limits many

16 *Medical Management of Type 1 Diabetes, supra*, pp. 134-138.

17 *Ibid.*

different major life activities.

The dilemma of a treatment which creates new and different health risks and problems is not unique to diabetes. Vaughn Murphy's treatment of his hypertension with medication creates new and different medical problems than those caused by his hypertension alone. The cruel predicament for many diseases which are treated with medication (*e.g.* hypertension and diabetes) is that the treatment, although potentially life-saving, can be more disabling than the untreated disease.

SUMMARY OF ARGUMENT

The Association urges this Court to fashion a definition of "impairment" which fulfills the broad, remedial purpose of the ADA. There are certain guiding criteria which are essential to creating and applying such a definition.

These criteria lead to a definition like that used in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) and in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998). A definition which is inclusive not exclusive, focuses on the disease not its treatment and encourages not discourages treatment. Such a definition must look at a disease in its natural, untreated condition.

ARGUMENT

AN "IMPAIRMENT" MUST BE LOOKED AT IN ITS NATURAL, UNTREATED CONDITION TO DETERMINE WHETHER IT QUALIFIES AS A "DISABILITY" UNDER THE ADA.

To receive the protections of the ADA, an individual must have an "impairment" which qualifies as a "disability." The threshold or entry issue is whether an individual has a qualifying "disability". The ADA is structured so that once an individual has a qualified "impairment" then there are other considerations such as whether that individual is "otherwise qualified" or needs to be "reasonably accommodated" in order to perform a particular job. An individual's ability to function with a disability should not and need not be addressed in the definition of "impairment" but, rather, how that "impairment" will permit or limit an individual to perform in the workplace.

The focus of the Tenth Circuit in this case on the effects of treatment in order to determine whether a disease qualifies as an "impairment" is misplaced, unnecessary and contrary to the remedial purpose of the ADA. Rather, in answering this threshold question this Court

should look at only the natural, untreated condition of the disease.

Both the First Circuit in *Arnold v. United Parcel Service, supra*, and the Ninth Circuit in *Kirkingburg v. Albertson's, Inc., supra*, look at the disease and not at the treatment to evaluate whether that disease qualifies as an "impairment" under the ADA. This approach is consistent with the clear congressional intent behind the ADA, the actual language of the ADA and the interpretation and application of the ADA by this Court in *Bragdon v. Abbott*, 524 U.S. ____, 118 S.Ct., 2196, 141 L.Ed.2d 540 (1998).

The focal point of this case is on the qualifying definition of "impairment" under a "prong one" definition of a disability. 42 U.S.C. § 12101(2)(A). This argument focuses only on a "prong one" analysis: When does an individual with a chronic, permanent, non-curable disease have an "impairment" that qualifies as a "disability" under the ADA?

A. THE DEFINITION OF "IMPAIRMENT" MUST BE INCLUSIVE TO FULFILL THE BROAD REMEDIAL PURPOSE OF THE ADA.

The narrow and restrictive definition of

"impairment" used by the court below (*i.e.* requiring that a disease be evaluated in its treated condition) creates an artificial choke point at the beginning of the ADA analysis. This means that many of the millions of Americans living with disabilities cannot qualify for ADA protection since the vast majority of those Americans treat their disability. Under this narrow and restrictive approach treatment defines "impairment" and determines legal protection.

The actual language of the ADA and its legislative history make it clear that the ADA was intended to have a broad, remedial purpose. Specifically, its Findings and Purpose show that Congress intended the ADA to impact the lives of more than 43,000,000 Americans to address "a serious and pervasive social problem" which "persists" for which they "often had no legal recourse" thereby making people with disabilities "severely disadvantaged." 42 U.S.C. § 12101(a) (1), (2), (3), (4) & (6). The most powerful Congressional statement about the broad remedial purpose of the ADA is as follows:

Individuals with disabilities are a discreet and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of

political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. 42 U.S.C. § 12101(a)(7).

Congress states that America's goals regarding individuals with disabilities are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Finally, Congressional intent is unambiguous that the ADA was to have a broad remedial scope. The stated purpose of the ADA is

. . . to provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1).

It is "a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 US 332, 336 (1967); *Arnold v. United Parcel Service, Inc.*, *supra*, 861. Given the clear, broad remedial purpose of the ADA, the Tenth Circuit's restrictive and narrow

definition of a qualifying "impairment" is contrary to that purpose.

To fulfill its broad remedial purpose the ADA is structured like a funnel with a broad open entrance to attract a wide variety of disabilities which can then be individually examined to see if they are eligible for ADA protection. The ADA analysis continually narrows as an individual with a particular "impairment" is evaluated for a specific job. The remedial purpose of the ADA is dramatically undermined if the qualifying definition for "impairment" is artificially narrowed.

B. THE DEFINITION OF "IMPAIRMENT" MUST FOCUS ON THE DISEASE AND NOT ON THE TREATMENT OF THAT DISEASE.

For purposes of deciding whether a particular disease qualifies as a "disability" under the ADA, it should not matter how or when that disease is treated. Rather, the impact and effectiveness of treatment for a disease should be examined in deciding whether that individual is "otherwise qualified" and needs "reasonable accommodation" to perform a particular job. In this context, the focus on the effect of treatment is not only appropriate, but necessary.

Congressional intent, the language of the ADA, the opinion of this Court and the interpretation of the EEOC support a definition of "impairment" that looks at a disease in its natural, untreated condition.

Again, Congressional intent is clear that "despite some improvements" "individuals with disabilities" "based on characteristics that are beyond the control of such individuals" need the broad remedial purpose of the ADA to eliminate discrimination. 42 U.S.C. § 12101(a) (2) & (7). These statements show that Congress anticipated that Americans living with disabilities would be evaluated by looking at the natural, untreated condition of that disability.

This Congressional intent is further supported by looking at various statements during the discussions and debates surrounding the passage of the ADA. For example, the House and Senate Committee reports state that a disability "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less

than substantial limitation."¹⁸ Both Houses indicated that individuals with impairments are considered to have an actual disability "even if the effects of the impairment are controlled by medication."¹⁹

The Tenth Circuit's decision in this case predates this Court's opinion in *Bragdon v. Abbott*, *supra*. Therefore the Tenth Circuit was not able to look to this Court for guidance in its interpretation of the ADA. In *Bragdon*, this Court concluded that non-symptomatic HIV infection is a "disability" under the ADA. In so deciding, the Court reasoned that a disease should be evaluated in its natural, untreated condition. In discussing whether medication therapy could lower the risk of perinatal transmission of the HIV infection during pregnancy and thereby substantially limit a major life activity, the Court stated:

The act addresses substantial limitations on major life activities, **not utter inabilities**. Conception and childbirth are not

18 H.R. Rep. No. 101-485, Pt. III, at 28 (1989), reprinted in 1990 U.S.C.C.A.N. 445, 451 (House Judiciary Report); H.R. Rep. No. 101-485, Pt. II, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303-334 ("House Labor Report"); S. Rep. No. 101-116, at 23 (1989) ("Senate Report").

19 House Labor report at 52; Senate Report at 22.

impossible for an HIV victim but, without doubt are dangerous to the public health.

... In the end, the disability definition does **not turn on personal choice**. When significant limitations result from the impairment, **the definition is met even if the difficulties are not insurmountable**.

(Emphasis added.) *Bragdon v. Abbott*, *supra*, 2206.

These statements show that the Court understands the realities of having a non-curable, permanent condition regardless of any treatment which may lessen only certain consequences of the disease. If non-symptomatic HIV infection is an "impairment" under the ADA, then certainly hypertension and diabetes are qualified "impairments" under the ADA.

Finally, the EEOC has interpreted the ADA to require evaluation of an "impairment" in its untreated condition to determine whether it qualifies as a "disability under the ADA."²⁰

Treatment of a particular medical condition is not the same as cure. Treatment of diabetes with insulin and treatment of

20 EEOC Interpretive Guidance, 29 C.F.R. Part 1630, App. §§ 1630.2(h) and 1630.2(j).

hypertension with medication²¹ do not cure those diseases but, rather, only treats certain symptoms and hopefully lessens or delays the onset of complications. Frequently, treatment with medication for a particular disease becomes more ineffective over time. Frequently, a particular disease breaks through the medication or treatment requiring dramatic changes in treatment. Virtually all diseases treated with medication face the inexorable problem that over time the medication becomes less effective for a variety of different reasons.

Additionally, the treatment of diseases such as diabetes or hypertension is extremely variable. Not only are all individuals treated in an individualized manner, but the amount and effect of the treatment changes daily and sometimes hourly based on other external factors. This is particularly true for diabetes where external factors such as illness, infection, stress, diet and activity level create a constantly changing situation which requires multiple daily blood tests to monitor. With diabetes, constant vigilance is

21 The treatment of hypertension with medication to reduce blood pressure results in "severe side-effects such [as] stuttering, loss of memory, impotence, lack of sleep and irritability." Pet.App. at 16a.

necessary for the reliable, predictable treatment of diabetes with insulin.

Under the Tenth Circuit's definition, someone can have a disability one day yet, because of the variabilities of treatment, not have a disability the next day. One day an employer cannot fire a person who appears sick with a disability, but on another day can fire that same person who appears well but has the same disability.

Another problem with focusing on treatment rather than on the disease is that treatment creates new and different medical complications which cause new and different disabling problems. For both hypertension and diabetes, the individual is always between "the rock and the hard spot" concerning whether the problems of the underlying disease are better or worse than the problems of the treatment. An individual with hypertension or diabetes has a real world disability whether or not they treat.

For Vaughn Murphy, the Tenth Circuit's evaluation of his hypertension in its treated condition ignores the disabling effect and complications created by that treatment. Vaughn Murphy is "disabled" whether or not he treats his hypertension.

C. THE DEFINITION OF "IMPAIRMENT" MUST ALLOW AN INDIVIDUAL TO PURSUE TREATMENT WITHOUT SACRIFICING LEGAL RIGHTS OR REMEDIES.

As the Court pointed out in *Arnold v. United Parcel Service, Inc.*, *supra*, it is an unintended "anomaly" for an individual to have to choose between medical treatment and legal protection. This puts an individual with an "impairment" between *Scylla* and *Charybdis*, i.e. treat and risk no legal protection or don't treat but have full legal protection. This is a cruel choice for an individual living with a disability. This is contrary to the Congressional Findings and Purpose because the ADA was designed and intended to provide individuals with "legal recourse" to eliminate discrimination. 42 U.S.C. § 12101(a)(4).

The effect of looking at a disease only in its treated condition means that an individual who tries to take care of himself or herself risks losing legal protection, whereas, if he or she does not try to take care of the disease, legal protection is available. This is not the result intended by Congress. Congress intended individuals living with disabilities to use every reasonable effort to

treat and care for themselves, but still have protection against discrimination. This is why the ADA is structured to handle the effect of treatment when considering the "otherwise qualified" and "reasonable accommodation" issues.

Surely, Congress did not intend individuals to forego efforts to lessen the discomfort and problems of their disease just to qualify for legal protection. Rather, Congress intended individuals with disabilities to have "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8). It is the purpose of the ADA to encourage individuals in every way possible to live well with their disability rather than to discourage or penalize persons for such efforts.

The unintended consequences of the restrictive definition of "impairment" by the Tenth Circuit in this case forces a no-win choice for millions of Americans. The ADA was not created to protect the rights and provide remedies for individuals who are not able to work because they do **not** treat their disability. Affirming the Tenth Circuit will create that result. Effort to treat should be rewarded with and not denied ADA protection.

No individual living with a disability should

ever be discouraged from doing everything possible to live well with that disability. No one should be caught in the "Catch 22" of treating their disability only to lose ADA protection.

CONCLUSION

Under the Tenth Circuit's approach to the ADA an individual with a disability is a double victim - a victim of his disease and a victim of the ADA because he tried to treat his disease. Only if this Court looks at a disease in its natural, untreated condition can an individual with a disease receive the intended protection of the ADA.

This Court should reverse and remand this case.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
v. *Petitioners,*

UNITED AIR LINES, INC.,
Respondent.

VAUGHN L. MURPHY,
v. *Petitioner,*

UNITED PARCEL SERVICE, INC.,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL,
THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, AND THE
MICHIGAN MANUFACTURERS ASSOCIATION
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**BRIEF AMICI CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL,
THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, AND THE
MICHIGAN MANUFACTURERS ASSOCIATION
IN SUPPORT OF RESPONDENTS**

The Equal Employment Advisory Council, The Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association respectfully submit this brief as *amici curiae*.¹ Letters of consent from all parties have been filed with the Court. The brief urges this Court to affirm the decisions below, and thus supports the position of Respondents United Air Lines, Inc. and United Parcel Service, Inc.

INTEREST OF THE AMICI CURIAE

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than

¹ Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment law issues of national concern to the business community.

The Michigan Manufacturers Association (MMA) is an association of private Michigan employers studying matters of general interest to its members; promoting their interests and the interests of all Michigan employers in the proper administration of laws; and otherwise promoting the general business and economic welfare of Michigan. MMA's over four thousand members employ 90% of the industrial workforce in Michigan—over one million employees. An important aspect of MMA's activities is representing its members' interests in matters before the courts as *amicus curiae*.

All of EEAC's members and many of the Chamber's and MMA's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 (Title I). Many own commercial facilities subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189 (Title III), and many own, operate, lease, or lease to places of public accommodation, also subject to Title III. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also, some members are the recipients of federal financial assistance and therefore are subject to the nondiscrimination provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 share a common definition of "disability" which establishes the parameters of the pro-

ected class under each statute.² Both statutes define "disability" in terms of an impairment that "substantially limits" a major life activity. Thus, EEAC's, the Chamber's and MMA's members have a direct interest in the issues presented in this case; *i.e.*, whether a court should determine whether an individual has a disability based on the individual's use of corrective measures, and whether an individual can establish a "regarded as" claim under the ADA simply because the individual has an impairment or medical condition that renders the individual unqualified for a particular job.

Because of their interest in the application of the nation's fair employment laws, EEAC, the Chamber, and MMA have filed briefs as *amicus curiae* in numerous cases before this Court.³ Thus, EEAC, the Chamber, and

² The ADA definition of "disability" mirrors the definition of "handicapped individual" that appeared in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, at the time the ADA was passed, and the ADA's legislative history confirms the Rehabilitation Act as the source of the ADA definition. S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332. *See also* *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998) ("[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act.")

³ EEAC participated as *amicus curiae* in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), which addressed the definition of a "disability" under the ADA. EEAC also participated as *amicus curiae* in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and other cases in this Court construing the Rehabilitation Act of 1973. *E.g.*, *Alexander v. Choate*, 469 U.S. 287 (1985); *CONRAIL v. Darrone*, 465 U.S. 624 (1984); *University of Texas v. Camenisch*, 451 U.S. 390 (1981). EEAC and the Chamber have participated in numerous other employment discrimination cases before this Court. *E.g.*, *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991) (sex discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (sexual harassment); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (age discrimination). MMA has also filed briefs with this Court in *Chrysler Corp. v. Smolarek*, *cert. denied*, 493 U.S. 992 (1989) (whether § 301 of the Labor Management Relations Act preempted claims under Michigan's Handicappers' Civil

MMA have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC, the Chamber, and MMA seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties. Because of their experience in these matters, EEAC, the Chamber, and MMA are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASES

Sutton v. United Air Lines, Inc.

Petitioners Karen Sutton and Kimberly Hinton are twin sisters who were commercial airline pilots for regional commuter airlines. Each had a "life long goal to fly for a major air carrier." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 895 (10th Cir. 1998). While each of the Petitioners has 20/20 corrected vision in both eyes, without correction their vision is 20/200 in the right eye and 20/400 in the left eye. *Id.* As a result, the sisters do not qualify for commercial airline pilot positions with United Air Lines ("United") because the company requires that applicants for pilot positions have at least 20/100 uncorrected vision in each eye. *Id.*

The sisters sued United under ADA, alleging that United had discriminated against them because they were substantially limited in the major life activity of seeing. Alternatively, the sisters alleged that United regarded them

Rights Act) and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) (retroactive application of an amendment to the Workers' Disability Compensation Act in Michigan). EEAC, the Chamber, and the MMA all participated in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (after-acquired evidence) before this Court.

as disabled by regarding them as substantially limited in the major life activity of working. *Id.* The district court held that the sisters were not disabled under the ADA because their vision impairments, when corrected, did not substantially limit a major life activity. *Id.* at 896. The district court further found that United did not regard the sisters as disabled. *Id.* On appeal, the Tenth Circuit affirmed the district court's decision. *Id.* at 906. The Court granted the sisters' petition for a writ of certiorari.

Murphy v. United Parcel Service, Inc.

Petitioner Vaughn Murphy ("Murphy") has had high blood pressure since he was ten years old. *Murphy v. UPS*, 946 F.Supp. 872, 875 (D. Kan. 1996). In August of 1994, he applied for a position with United Parcel Service, Inc. ("UPS") as a mechanic. Since UPS mechanics are required to drive large trucks, they must hold commercial driver's licenses. *Id.* In order to hold a commercial driver's license, the Department of Transportation ("DOT") requires that an individual meet certain physical qualification standards, including a blood pressure level less than 160/90. *Id.* at 876. When Murphy took his DOT physical examination in August of 1994, his blood pressure was 186/124, well above the DOT limit. The testing clinic, however, erroneously issued him a "DOT health card." Approximately one month later, while reviewing medical records, UPS' Medical Services Supervisor discovered the error. UPS terminated Murphy after retesting his blood pressure, and confirming that it exceeded the DOT limit. *Id.*

Murphy sued UPS under the ADA, arguing in part that UPS had discriminated against him because he had a disability, or alternatively, because it regarded him as having a disability. The district court granted summary judgment in favor of UPS, and Murphy appealed. *Id.* at 884. The Tenth Circuit affirmed the district court's deci-

sion, finding that whether Murphy was substantially limited should be determined in his medicated state and that UPS did not regard Murphy as disabled because it relied on the DOT blood pressure standards. *Murphy v. UPS*, 1998 U.S. App. LEXIS 4439 (10th Cir. 1998) (unreported decision). This Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals properly concluded that Petitioners are not individuals with disabilities protected by the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA). Whether an individual has a "disability" as defined by the plain language of the ADA turns on whether the individual has an impairment that in fact "substantially limits a major life activity." 42 U.S.C. § 12102(2). Therefore, any mitigating measures the individual uses to reduce the effect of the impairment necessarily affects this determination. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997). The legislative history, although conflicting, ultimately supports this conclusion. Thus, the EEOC's guidance is entitled to no deference because it is manifestly contrary to the statute.

The ADA was not intended to cover those individuals who have common, minor impairments that are easily controlled. Rather, it requires that an individual be "substantially limited," a comparative term that "is to be measured in relation to normalcy, or in any event, to what the average person does." *Solileau v. Guilford of Maine*, 105 F.3d 12, 15-16 (1st Cir. 1997). An individual with a commonly controlled, widely-shared condition is simply not "substantially limited" as compared to the average person. Indeed, the First and Fifth Circuits both have suggested that even if the EEOC guidance is to be deferred to on the question of whether mitigating measures should be used, the guidance is not applicable unless serious impairments are at issue. *Washington v. HCA Health Servs.*

of Texas, Inc., 152 F.3d 464, 470 (5th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3561 (Dec. 2, 1998) (No. 98-1365); *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998).

The notion that a contrary ruling will prevent individuals from utilizing such measures is meritless. Rational individuals will not forego necessary medical procedures simply to obtain the Act's protections. Further, an individual who does not utilize available corrective measures may in fact lose the Act's protections because they are not qualified. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995).

The Court of Appeals also correctly concluded that the employers in these cases did not regard the petitioners as disabled. In order to establish that an individual is regarded as disabled, the individual must establish that he or she is regarded as being substantially limited in a major life activity. 42 U.S.C. § 12102(2)(C). The simple perception that an individual is unable to perform a particular job does not translate into a perception that the individual is substantially limited in employment opportunities in general. Further, rejection based on a medical condition or a medical standard does not automatically establish a "regarded as" claim. *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996). A contrary ruling not only would prohibit employers from developing legitimate qualification standards, but will result in extensive litigation for the courts and employers. This is not the result Congress had in mind when passing the ADA.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WHETHER AN INDIVIDUAL HAS A DISABILITY SHOULD BE ASSESSED BASED ON THE INDIVIDUAL'S USE OF CORRECTIVE MEASURES

A. The ADA Requires That An Individual Actually Be Substantially Limited In a Major Life Activity To Establish a Disability Under the ADA

The Court of Appeals correctly concluded that the plain language of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, requires that an assessment of whether an individual has a disability under part A of the ADA's definition of "disability" take into account the individual's use of corrective measures. *Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1998). The ADA prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The verb "limits" is used in its present tense form. Therefore, an individual who is not presently "substantially limited" in a major life activity does not have a "disability" under part A of the statutory definition. Thus, if an individual currently is able to control the effects of his or her impairment with medication or other mitigating measures so that he or she is not substantially limited in a major life activity, he or she should not be considered disabled under part A of the definition.

Like the Tenth Circuit, the Sixth Circuit has held that the plain language of the ADA requires that a "disability" under part A be evaluated based on the individual's limitations with the use of medication. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (Kennedy, J. and Guy, J. concurring on this point.).⁴ Judge Kennedy, in her concurring opinion, pointed out that the term "sub-

⁴ Conversely, the Second, Third, and Eleventh Circuits have unequivocally ruled that mitigating measures should not be considered. *Barlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998), *petition for cert. filed*, No. 98-1285, 67 U.S.L.W. 3528 (Feb. 23, 1999); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997); *Harris v. H&W Contr. Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996). The Ninth Circuit has mentioned this same principle although it decided the case on other grounds. *E.g., Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996), *cert. denied*, 502 U.S. 1162 (1997); *Kirkingburg v. Albertsons, Inc.*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999). While one Seventh Circuit panel clearly held that mitigating measures should not be considered, *e.g. Baert v. Euclid Bev., Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998), another Seventh Circuit panel cited the EEOC's guidance on evaluating a disability without regard to mitigating measures, but then proceeded to analyze whether the plaintiff had a disability based on his use of eyewear. *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995). The Eighth Circuit similarly endorsed the notion that mitigating measures should not be considered in *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998), but took an approach similar to *Roth* in *Zirpel v. Toshiba Am. Info. Sys.*, 111 F.3d 80, 81 (8th Cir. 1997) (determining that individual was not disabled based in part on the fact that the panic disorder was very manageable with treatment, thereby endorsing argument that mitigating measures should be considered.) The First Circuit has held that mitigating measures should not be taken into account, but limited its decision to diabetes, and suggested that it could take a different approach if a different medical condition were at issue. *Arnold v. UPS*, 136 F.3d 854, 859-866 (1st Cir. 1998). The Fifth Circuit has taken a middle of the road approach, holding that only "serious impairments" should be considered without regard to mitigating measures, but reserving the determination of what is "serious" to be resolved on a case-by-case basis. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470-471 (5th Cir. 1998).

stantially limited" would be written out of the statute if a person were not in fact evaluated given the effects of his or her medication. In rejecting the EEOC's opposite conclusion as to the meaning of the ADA, Judge Kennedy observed as follows:

The EEOC is creating a different standard for persons who take medication for their condition. This conflicts with the *plain reading* of the statute. The ADA does not provide protection for anyone with any degree of physical or mental impairment: It provides protection only for those impairments that substantially limit their lives. I do not believe that Congress intended the ADA to protect as "disabled" all individuals whose life activities would *hypothetically* be substantially limited were they to stop taking medication.

Mecosta, 124 F.3d at 767 (Kennedy, J., concurring in part, dissenting in part) (emphasis added).

Thus, this Court should look no further than the statutory definition of the ADA to determine whether the use of medication or other corrective measures should be considered to determine whether an individual is substantially limited in a major life activity under part A of the ADA's "disability" definition. "The starting point in statutory interpretation is the language [of the statute] itself." *U.S. v. Ramirez-Ferrer*, 82 F.3d 1131, 1136 (1st Cir. 1996) (quoting *U.S. v. James*, 478 U.S. 597, 604 (1986)). For, as this Court has stated "time and again," the "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Unless a statute's wording is unclear, a court should not even pause to consider arguments for a different interpretation based on legislative history or purpose. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.*

Id. (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Should the Court choose to look further than the plain language of the ADA, however, the Court will find that although conflicting, the legislative history ultimately supports the conclusion reached by the Court of Appeals below. The Reports of the House Education and Labor Committee, the House Judiciary Committee, and the Senate Committee on Labor and Human Resources ("Senate Labor Committee") all state that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as *reasonable accommodation or auxiliary aids*." H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. Rep. No. 101-116, at 23 (1989) (emphasis added). The two House Reports proceed to assert that mitigating measures include medication and assistive devices such as hearing aids. H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; H.R. Rep. No. 101-485, pt. 3, at 28-29, *reprinted in* 1990 U.S.C.C.A.N. at 451.

The Senate Report makes no such assertion, however. This suggests that at least one Congressional committee was referring to *employer* provided accommodations when stating that mitigating measures should not be considered. The ADA defines a "reasonable accommodation" in the context of the obligations an employer has with respect to an individual with a disability, and "auxiliary aids" in the context of the obligations a place of public accommodation has with respect to an individual with a disability. *See* 42 U.S.C. §§ 12111(9), 12182(b)(2)(iii). Further, in its discussion of the meaning of reasonable accommodation, the Senate report states emphatically that "[t]he Committee wishes to make it clear that non job-related personal use items such as hearing aids and eye-

glasses are not included in this provision." S. Rep. No. 101-116 at 33.

Further, the Senate Report unequivocally states that part of the rationale for including the "regarded as" prong in the overall definition of a "disability" was to cover individuals who, because of their ability to *control* an impairment, were *not in fact* substantially limited but nevertheless were *falsely* regarded as *being* substantially limited. This language indicates that the Senate contemplated that individuals who had controlled conditions and as a result were not in fact substantially limited would not be covered by part A of the "disability" definition. As the Report indicates:

Another important goal of the third prong of the definition is to ensure that persons with medical conditions *that are under control*, and that therefore do not *currently* limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S.Rep. No. 101-116, at 28. (emphasis added).⁵

The legislative history also underscores the plain language of the ADA that requires an individual to be substantially limited *in fact* in order to be covered by part A, thereby further verifying that Congress contemplated taking mitigating measures into account when ascertaining whether a disability exists. The Committee Reports state unequivocally that "[a] physical or mental impairment does not constitute a disability under the first prong of

⁵ Senators Harkin, Dole, and Kennedy argue as *amicus* that this provision was not meant to suggest mitigating measures should be considered in ascertaining whether an individual has a disability. However, as this Court has previously held, "Legislative observations 10 years after passage of the Act are in no sense part of legislative history." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 202 (1977).

the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation' of one or more major life activities." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. Evidence that the statute requires a current, functional analysis of limitation is demonstrated in an example in the Committee Reports:

A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22.

This example confirms that Congress was focusing not on the hypothetical, but on how the individual actually is limited on a functional level in performing the major life activity. As one commentator noted, the "hypothetical approach is counterintuitive; legislative history and statutory provisions of the ADA do not support it." Erica W. Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search For the Meaning of Disability*, 73 *Wash. L. Rev.* 575, 580 (1998). Thus, putting the question of whether mitigating measures should be considered in the context of the overall guidance provided by Congress with regard to interpreting the definition of a disability, it becomes evident that Congress meant only for individuals functionally challenged to obtain protections under part A of the definition of a disability. Individuals who by virtue of medication or other devices are not substantially limited do not fall within the category of individuals to be protected.

B. The Court Should Not Defer to EEOC's Interpretive Guidance

1. EEOC's Interpretive Guidance Is Not Entitled to Deference Because It Is Manifestly Contrary to the Statute

Petitioners argue that the EEOC's interpretive guidance should be accorded deference under the so-called *Chevron* doctrine, which requires that a court defer to permissible agency statutory constructions where the statute itself is silent or ambiguous. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Even assuming that the *Chevron* doctrine applies to agency interpretive rules, however, the EEOC rule at issue here would fail to meet the *Chevron* test. This is because the first prong of the *Chevron* analysis—the prerequisite for invoking the deference doctrine—requires that the statute be silent or ambiguous on the issue subject to the agency regulation.

First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the courts is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43. See also, *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 447-48 (1987). As explained above, the plain language of the ADA requires that the phrase "substantially limited" be assessed in light of the corrective measures available to the impaired individual.

Consequently, the petitioners' invocation of *Chevron* is inapplicable.

2. The Chevron Doctrine Does Not Apply to Interpretive Rules

Even if the Court were to find the statutory provisions at issue ambiguous, the *Chevron* doctrine should not apply to the EEOC rule at issue in this case. This is because the rule in question was promulgated not as a regulation or "legislative rule," but rather, as an "interpretive rule." This Court should definitively hold that the *Chevron* doctrine does not apply to interpretive rules.

The majority of the circuits that have addressed this issue have concluded that *Chevron* deference should not be accorded to interpretive rules. *Cent. Midwest Interstate Low-Level Waste Comm'n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) ("we do not apply *Chevron's* 'rubber stamp' to interpretive rules"); *Jacks v. Crabtree*, 114 F.3d 983, 985 n.1 (9th Cir. 1997) (*Chevron* applies to legislative rules, not policy guidance), *cert. denied*, 118 S. Ct. 1196 (1998); *Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999); *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996) (policy pronouncements less formal than legislative rules "are not accorded full *Chevron* deference"); *Washington*, 152 F.3d at 470-471 (interpretive rules not accorded *Chevron* deference).⁶

These courts prudently have concluded that such rules "are entitled to less deference than published regulations because they are not promulgated subject to the rigors of the Administrative Procedure Act, 5 U.S.C. § 553, includ-

⁶ But see *Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1363-64 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 54 (1998); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

ing public notice and comment, and 'are merely internal guidelines [that] may be altered by the [agency] at will.'" *Jacks*, 114 F.3d at 985 n.1 (citations omitted). The Tenth Circuit explained the danger of according *Chevron* deference to agency interpretive rules as follows:

[A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, *an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when applied to them.*

Southern Ute Indian Tribe, 119 F.3d at 833 (citation and footnotes omitted) (emphasis in original). Indeed, applying the *Chevron* rule to interpretive guidance effectively would render the notice and comment requirement of the APA nugatory, as agencies could issue legally binding mandates on nothing more than the political whims of the administrators.

For organizations such as EEAC, the Chamber, and MMA, such a rule would be highly troubling. Companies are highly regulated by numerous federal agencies. The notice and comment procedure of the APA provides companies the only available avenue to help shape policies that will greatly affect their operations. The absence of strict adherence to this requirement will lead to regulation by ambush. Based on these considerations, "the better-reasoned opinions" hold that interpretive rules are not entitled to *Chevron* deference. Kenneth Davis & Richard Pierce, Jr., *Administrative Law Treatise* § 3.5 at 55 (1998 Supp.).

In February 1991, when EEOC published its proposed ADA rules and guidance, the agency made no reference to the substantive rule of law that it now proclaims—that the phrase "substantially limited" must be made without regard to corrective devices or mitigating measures. 56 Fed. Reg. 8593 (1991). It was not until EEOC issued its final interpretive guidance, after all opportunity for comment by the regulated community had expired, that EEOC announced this purported rule of law. This is precisely the sort of danger that the Administrative Procedure Act was designed to prevent, and it is why this Court should refuse to accord *Chevron* deference to agency interpretive rules.

Although this Court has recognized that interpretive rules should be shown "some" deference where more than one interpretation of the statute is permissible, *Reno v. Koray*, 515 U.S. 50, 61 (1995), the Court has concluded that "interpretive rules . . . do not have the force and effect of law, and are not accorded that weight in the adjudicatory process." The weight accorded such rules is directly proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under this standard of review, no deference should be given to the interpretive rule at issue in this case.⁷

⁷ We also note that EEOC's guidance is internally inconsistent on this point, further reducing the deference that the Court should accord these rules. As noted above, the agency's Interpretative Guidance asserts that the evaluation of an individual's impairment should take place without regard to any mitigating measures taken. Yet, in its explanation of what "regarded as substantially limited" means, the agency states as follows:

[T]he individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: an employee has controlled high blood pressure which does not substantially limit his work

C. At a Minimum, This Court Should Hold That the ADA Does Not Cover Individuals With Controlled, Minor Impairments That Are Widely Shared

Even if this Court determines that controlling measures should not be a factor in determining whether an individual is substantially limited, this Court should limit such a ruling as applicable only to serious impairments, as opposed to minor impairments that are common and easily controlled. If this Court extends ADA protection to individuals with impairments that are easily correctable and unremarkable, such as high blood pressure that can be controlled with medication, or poor vision that can be controlled by wearing ordinary eyeglasses, it will diffuse the protections given to those individuals actually in need of the ADA's protection, those individuals with true disabilities. Individuals with readily correctable impairments simply are not "substantially limited" compared to the average person. Indeed, in determining whether an impairment is substantially limiting, it "is to be measured in relation to normalcy, or in any event, to what the average person does." *Solileau v. Guilford of Maine*, 105 F.3d 12, 15-16 (1st Cir. 1997). The Second Circuit has emphasized that the Rehabilitation Act does not cover minor impairments that are not unusual:

It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose *relative severity of impairment* was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more gen-

activities. If an employer reassigns the individual to a less strenuous job because of unsubstantiated fear that the person would suffer a heart attack if he continues in the present job, the employer has "regarded" this person as disabled.

29 C.F.R. App. § 1630.2(1). Thus, EEOC's own example implicitly recognizes that if a condition can be "controlled," the individual may not be substantially limited.

eral disadvantage in his or her search for satisfactory employment.

Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (emphasis added) (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

Even two of the courts of appeals that have deferred to the EEOC guidance on the question of mitigating measures limited their rulings to suggest that the guidance is not necessarily applicable when minor or widely shared impairments are at issue. The Fifth Circuit held that the EEOC's interpretative guidance and legislative history suggested mitigating measures should *not* be considered in finding that an individual with Adult Stills Disease had a disability,⁸ but limited its holding as applicable only to "serious impairments and ailments:"

There is nothing in the Interpretative Guidelines or the legislative history that suggests that *all* impairments must be considered in their unmitigated states and *no* mitigating measures may ever be taken into account. We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 470 (5th Cir. 1998).

Likewise, the First Circuit, which also determined that an individual with diabetes mellitus should be evaluated without the use of mitigating measures to determine if he had a disability, "venture[d] no opinion as to whether [it] would reach the same conclusion if other medical conditions or other facts were presented." *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998). The First Circuit sug-

⁸ The Fifth Circuit reached this conclusion despite the fact it felt that the argument that mitigating measures *should* be taken into account "offered the most reasonable reading of the ADA." *Id.*

gested that it might take a different approach if a non-serious condition was at issue:

For example, we might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses. The availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of "minor trivial impairment," Senate Report at 23, that would not be considered a disability under the ADA.

Id. at n.10.

Thus, even the courts that have taken the position that mitigating measures should not be a factor in determining whether an individual is substantially limited only take this position so far. These courts acknowledge that to establish standing under part A of the ADA's definition of a "disability," a condition should not be shared by a significant portion of the general population. Therefore, at the very minimum, this Court should endorse Congress' intent that the ADA does not cover individuals with minor, widely shared impairments that are readily and easily correctable.

D. A Ruling That the Use of Corrective Measures Should Be Considered In Determining Whether An Individual Is Substantially Limited Will Not Discourage the Use of Corrective Measures

Petitioners and several of their *amici* argue that a holding that corrective measures are to be taken into account to ascertain whether a disability exists will encourage individuals to refrain from using corrective measures in order to obtain the Act's protections. This argument is specious for several reasons.

First, the purpose of the ADA is to create a level playing field for individuals with and without disabilities. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666

(7th Cir. 1995). Essentially, Congress designed the ADA to help those individuals who could not help themselves, not to give special privileges to individuals who could control the effects of an impairment but chose not to. Indeed, part of Congress' findings in passing the ADA includes the following:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are *beyond the control of such individuals* and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(A)(7) (emphasis added). To argue that the ADA's protections provide an incentive to forego medical treatment is clearly counter to the purpose of the ADA.

Moreover, the argument that the consideration of controlled measures in determining whether an individual has a disability will prevent self-help, taken to its extreme, suggests that the ADA could motivate individuals to inflict injuries on themselves to obtain the Act's protections. It is difficult to believe that individuals would act in such an irrational manner. As one commentator pointed out:

Most obviously, rational people will not cease to mitigate their impairments because the cost of living with an impairment that substantially limits a major life activity, even when combined with the added benefit of more generous ADA protection, is far greater than the cost of undertaking such measures. Rational individuals would pay a hundred dollars per month for medication that would enable them to live free of severe pain rather than sit at home

in pain to save a thousand dollars per month and receive the benefits of ADA protection.

Harris, *supra*, at 600-601.

Ms. Harris also observes that an individual who chooses not to control his or her impairment may not be able to perform the essential functions of a job, with or without a reasonable accommodation and thus will not be "qualified" under the ADA. *Id.* See also 42 U.S.C. § 12111(8). Indeed, as the Eighth Circuit recently decided, a police recruit who failed to control his diabetes with medication was not a qualified individual with a disability and therefore could not establish a cause of action under the ADA. *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). See also *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995) ("When an employee knows that he is afflicted with a disability but needs no accommodation from his employer, and fails to meet the employer's 'legitimate job expectations,' due to his failure to control a controllable disability, he cannot state a cause of action under the ADA.") (citation omitted).

An individual's efforts to control the effects of an impairment do not automatically disqualify the individual from the Act's protections. However, "an individual's use of medication, or even a prosthetic limb, is part and parcel of their condition. Thus, if as part of that condition, they are capable of performing major life activities the same as an individual without the condition, they are not actually 'substantially limited' from performing a major life activity and therefore are not protected by the ADA." Adam C. Wit, *Should "Mitigating Measures" Be Considered in the "Disability" Analysis under the ADA?* 24 Empl. Rel. L. J. 73, 88 (Summer 1998). The notion that individuals will avoid self-help simply to achieve the Act's protections is unpersuasive and should not be endorsed as a legitimate reason to expand the protections of the statute beyond its intended reach.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYERS DID NOT "REGARD" THE PETITIONERS AS DISABLED

A. The ADA Requires That a Plaintiff Establish That an Employer Regarded the Individual as Substantially Limited in a Major Life Activity To Establish That the Individual Is "Regarded As" Disabled

An individual also can establish that he or she has a disability under the ADA by showing that he or she was "regarded as" having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C) (hereinafter referred to as the "regarded as" prong).⁹ Thus, it is not sufficient for a plaintiff simply to allege that he or she is "regarded as" having an impairment to establish standing under the "regarded as" prong of the statute. Rather, the plaintiff must show that the employer regarded him or her as having an impairment that substantially limits a major life activity. "As with real impairments, . . . a perceived impairment must be substantially limiting and significant." *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997), citing *Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 913 (11th Cir. 1996).

1. The Perception That an Individual Is Unable To Perform a Particular Job Does Not Translate Into a Perception That the Individual Is Substantially Limited

The majority of cases brought by plaintiffs under the "regarded as" prong of the ADA rest on allegations that

⁹ Congress emphasized that this prong was designed to protect the individual who was not hired because of the "negative reactions" of employers, and adopted the rationale used in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which this Court concluded that Congress drafted the Rehabilitation Act to address the fact that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from the actual impairment." H.R. Rep. No. 101-485, pt. 2, at 53, reprinted in 1990 U.S.C.C.A.N. at 335.

the plaintiff is regarded as substantially limited in the major life activity of "working" because the individual was denied a job opportunity as the result of an impairment. However, as the Fifth Circuit has observed, "[a]n employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job." *Pryor v. Trane Co.*, 138 F.3d 1024, 1028 (5th Cir. 1998). Nor does working mean "working at a particular job of that person's choice." *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995). See also 29 C.F.R. App. § 1630.2.

Rather, "a finding that a plaintiff is substantially limited in working requires a showing that her overall employment opportunities are limited." *Miller v. City of Springfield*, 146 F.3d 612, 614 (8th Cir. 1998). See also *Baulos v. Roadway Exp. Inc.*, 139 F.3d 1147, 1151 (7th Cir. 1998) ("It is now well-established that an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work; rather, the impairment must substantially limit employment generally.")¹⁰ Thus, it is not enough that a plaintiff simply allege that he or she is precluded from a particular job to establish a claim under the "regarded as" prong of the ADA based on a limitation in working. Instead, an individual must establish that the employer regards the individual as substantially limited in a broad range of job opportunities.

Applying this logic, the Eleventh Circuit found that an individual who had a personality disorder and therefore

¹⁰ Courts interpreting the Rehabilitation Act also have concluded that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the statute." *Jasany v. United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1995) (emphasis in original).

was denied FAA Class I Medical Certification was not substantially limited in the major life activity of working merely because he could no longer fly a commercial aircraft. *Witter v. Delta Air Lines*, 138 F.3d 1366, 1370 (11th Cir. 1998). In making such a finding, the court observed that

there are non-pilot jobs which utilize "similar training, knowledge, skills or abilities as piloting jobs." Such jobs include pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

*Id.*¹¹

Thus, rejection from a person's job of choice is not enough to establish an individual is substantially limited in the major life activity of working. Rather, an individ-

¹¹ Indeed, the EEOC uses the following example to demonstrate the concept of someone not substantially limited in the major life activity of working:

A person who cannot qualify as a commercial airline pilot because of a minor vision impairment, but who could qualify as a co-pilot or a pilot for a courier service, would not be considered substantially limited in working just because he could not perform a particular job. Similarly, a baseball pitcher who develops a bad elbow and can no longer pitch would not be substantially limited in working because he could no longer perform the specialized job of pitching baseball.

EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act* II-6 (1992). Conveniently, the EEOC argues as *amicus* in these cases that this example does not apply because the petitioner disputes it and because the example assumes that an individual could obtain a co-pilot position. What the EEOC overlooks, however, is that the example also states the individual could qualify for a co-pilot or pilot for a courier service. Indeed, the plaintiffs in *Sutton* do currently fly planes. Thus, the example demonstrates that an individual, who is not completely precluded from utilizing his or her training, education, and job abilities, is not substantially limited in the major life activity of working.

ual must be precluded from the universe of jobs open to the individual in question based on that individual's skills and training. See *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997) (A plaintiff is not substantially limited in working, when "the condition does not significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.") Congress did not intend to give individuals the opportunity to establish a "regarded as" case against an employer simply because an impairment precluded them from performing a specific job they wanted. Rather, the "regarded as" prong protects only individuals who have impairments that limit them, due to "myth or stereotype," from performing major life activities as compared to the general population. The specialized activities of flying commercial planes or holding DOT licenses are not the types of activities most individuals are regarded as having the capability to perform.

2. An Employment Rejection Based on a Medical Condition Is Not Enough To Establish an Issue of Fact That an Employer Regarded an Individual as Disabled

Petitioners and several of their *amici* assert that when an employer rejects an individual from employment based on a medical condition, an issue of fact is created that the employer regards the individual as disabled. This argument ignores the requirement that a plaintiff show the employer regards the individual as having an impairment that substantially limits a major life activity in order to establish a "regarded as" case.

Numerous courts have rejected the notion that an individual can establish a "regarded as" claim only because he or she was denied employment opportunities based on physical standards. In *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996), the Eighth Circuit

found that the plaintiff failed to create a genuine issue of fact as to whether the city regarded him as having a disability when he was removed from a firefighter position because he failed to meet the required standards on a breathing capacity test. In finding that Smith was not regarded as being unable to perform any other jobs except that of a firefighter, the court noted that Smith had gone back to school and had taken another job when on leave from the fire department. *Id.* See also *Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996) (an individual with hemophilia who could not hold a firefighting position as a result of failure to meet physical qualification standards was not "regarded as" disabled), *cert. denied*, 519 U.S. 1093 (1997).

Similarly, in interpreting the Rehabilitation Act, the Fifth Circuit found that an employer does not regard an employee as disabled merely because the employee fails to meet physical standards patterned on Department of Transportation regulations. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1101 (1994). The Fifth Circuit noted that "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general." *Id.* at 1393.

Courts also have rejected a "regarded as" claim when an individual was denied employment opportunities based on limitations imposed by an individual's own physician. In *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), the Ninth Circuit rejected a "regarded as" claim by an individual who could not lift more than 25 pounds due to a work related injury and who eventually was terminated because she could not perform the essential functions of the job. The Ninth Circuit confirmed that, "an employer's decision to terminate an employee

'based upon the physical restrictions imposed by [her] doctor . . . does not indicate that [the employer] regarded [her] as having a substantially limiting impairment.'" *Thompson*, 121 F.3d at 541, citing *Wooten*, 58 F.3d 382, 386 (10th Cir. 1995).

The ADA requires that individuals be *perceived as substantially limited* to obtain the Act's protections. To establish a rule that anyone with an impairment can always establish standing under the "regarded as" prong of the ADA based solely on a qualification standard involving physical criteria expands the Act beyond its intended reach. A decision to reject an individual solely based on a physical standard or a medical condition is a determination of whether an individual is qualified for a particular employment position, not that the individual is necessarily perceived as substantially limited in general.

B. A Ruling That a "Regarded As" Claim Can Be Established Based on Medical or Physical Criteria Used in Rejecting an Individual From an Employment Opportunity Will Restrict Significantly an Employer's Ability To Establish Job Qualifications

To allow an individual to establish a "regarded as" claim simply because an individual was rejected from an employment position because he or she could not meet the employer's criteria would unduly restrict employers from maintaining qualification standards in the workplace. The costs of litigating the standard every time an individual suffered an adverse job action would be prohibitive. It is difficult to believe that Congress intended such a result. Indeed, as EEAC and the Chamber argued in their brief to this Court in *Albertsons v. Kirkingburg*, 98-591, employers should be able to rely on physical criteria to establish job qualifications if consistent with business necessity. See 42 U.S.C. § 12113(a). Whether or not a qualification standard is consistent with business necessity, however, does not translate into a right to sue

under the "regarded as" prong of the ADA's disability definition.

According to Petitioners' logic, any employee rejected for a job based on a medical condition or impairment could maintain standing to sue an employer without any showing that the employer believed the individual was substantially limited in a major life activity. A hypothetical demonstrates this result. Two individuals apply for a lead in a Broadway musical. Both have dreams of stardom and both have taken voice lessons. One has a poor voice because of a throat disorder while the other has a poor voice because of bad luck. The producer rejects both individuals because of a simple belief that neither individual has a voice that is of sufficient quality to participate in the musical, not because she believes—or even considered—that one or both of the individuals has a throat disorder. Petitioners' argument would support the notion that the producer could not reject either applicant without risking a "regarded as" claim.

While this example simply involves public taste, the cases before the Court involve public safety. Employers develop standards such as these to maintain a workforce that exceeds the physical qualifications of the average individual. Therefore, *both* the average member of the general population and the individual who is substantially limited compared to the average member of the general population will be precluded from such employment opportunities. This preclusion does not equal a "regarded as" claim according to the statutory definition of a "disability" which requires some evidence that the individual was "regarded as" substantially limited.

A ruling that a "regarded as" claim exists simply because employers have relied on medical information about the employee, or simply utilized physical criteria in developing job qualifications, will deter employers from developing legitimate job qualifications, hindering a com-

pany from effectively doing business. This Court should not permit such a result.

CONCLUSION

For the foregoing reasons, *amici* the Equal Employment Advisory Council, The Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association respectfully submit that the decisions below should be affirmed.

Respectfully submitted,

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October Term, 1998

Karen Sutton and Kimberly Hinton,
Petitioners,

v.

United Air Lines, Inc.,
Respondent.

and

Vaughn L. Murphy,
Petitioner,

v.

United Parcel Service, Inc.
Respondent.

*On Writs of Certiorari to the United States
Court of Appeals For the Tenth Circuit*

**BRIEF OF AMICUS CURIAE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM"), the voice of human resource professionals for over 50 years, submits this brief in support of Respondents United Air Lines and United Parcel Service.¹ SHRM represents over 113,000 human resource professionals in the United States and in 80 other countries. SHRM leads, educates, and provides a forum for human resource professionals regarding matters of critical daily importance to managing employees in the workplace. Human resource professionals develop and administer structures to recruit, train, and manage employees in all types of work environments. SHRM and its members are deeply concerned with understanding and implementing all non-discrimination and equal opportunity laws and principles in the workplace.

In this particular case, SHRM's members are typically the persons involved in implementing, administering and training on non-discrimination policies covering employees with disabilities, guarding employees' medical information, and developing reasonable accommodations under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Grasping the ADA's fluid requirements, especially in light of inconsistent EEOC interpretations and conflicting court rulings, poses a unique challenge to SHRM members and anyone managing disabilities in the workplace.

The cases before this Court on the value of mitigating measures and treatments highlight this challenge. Though trained in evaluating job performance and functional limitations of individuals (with or without disabilities), human resource departments and staffs lack the medical training

¹ *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the written consent of the parties. Evidence of said consent is filed concurrently with this brief. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

necessary to speculate on how physical or mental conditions *would theoretically* affect an individual in the absence of effective treatments that render a person perfectly functional in and out of the workplace. Yet, the rule urged by Petitioners and some *amici* -- that mitigating measures such as medical regimens, auxiliary aids, or common treatments should never be considered in determining whether an individual with a physical or mental impairment is substantially limited in a major life activity so as to have a "disability" under the ADA -- places human resource professionals precisely in this untenable position. The practical experience of SHRM members teaches that such a rule is simply unworkable. Moreover, Petitioners' proposed rule defies the language and intent of the ADA.

SHRM urges the Court to seize this opportunity to formulate a clear and consistent rule, one that protects the interests of the intended beneficiaries of the ADA, that comports with the statutory language and with the EEOC's approach to other aspects of the ADA, and that allows for ease of application in the real world of the workplace, benefitting employers and employees alike. Employees should be assessed solely on the basis of how they actually function, with whatever medical aids they normally use.

SUMMARY OF ARGUMENT

In enacting the ADA, Congress intended to protect the minority of Americans with true physical or mental disabilities who, despite their condition, can function in the world of work. The ADA seeks to bring formerly marginalized persons into the mainstream of society, not *vice versa*. The vast majority of people who wear eyeglasses, or who take medications that fully or substantially relieve the effects of a wide variety of common conditions, are not generally seen as having "disabilities," have not been marginalized, and should not fall within the ADA's special definition of its protected class. In determining who has a "disability" under the ADA, employers and courts should

evaluate persons individually as they actually function, and not speculate on how they might function in some hypothetical state.

The entire language and structure of the ADA bespeak Congress' intent to look to individuals' actual abilities, and to discourage employers from conjuring up imaginary scenarios that only feed stereotypical views of persons with physical or mental impairments as persons who cannot function. Thus the rule urged by Petitioners and the EEOC not only trivializes the ADA's purposes, it works against those purposes. It also places an impossible burden on employers, who lack the resources and medical expertise to predict the potential dysfunctions of a now-functional individual if medications or devices were removed.

The EEOC's interpretations of other aspects of the ADA affirm the guiding principle that any inquiry should focus on actual function and actual "substantial limitations" to the individual's major life activities. Its argument that mitigating measures should not be considered in defining an individual's disability is therefore inconsistent with its overall approach to the ADA. Along with an ambiguous legislative history, this inconsistent approach has in turn led to conflicting court rulings, and to hopeless confusion among employers and employees alike. Again, the Court needs to articulate a clear, simple rule, one that comports with the actual language of the statute, that protects those intended to be protected, and that can be readily applied in the real world of work. This real-world, total-picture approach, one that regards each person as a functioning individual, is far superior to the inflexible, artificial, and confusing definitional scheme that Petitioners seek to advance. It is also truer to the ADA's language and purposes.

The rule SHRM urges will not leave ADA's intended beneficiaries unprotected. Some ameliorative measures, such as medication with severe side effects, may impair an employee's function, or leave the individual still "substantially limited" in his or her major life activities. In

such cases, those effects, too, should be taken into account in a functional-ability test.

ARGUMENT

I. PETITIONERS' PROPOSED RULE, TO DISREGARD THE ACTUAL, SALUTARY EFFECTS OF AMELIORATING TREATMENTS IN DETERMINING "DISABILITY" STATUS AND "SUBSTANTIAL LIMITATIONS," IS UNWORKABLE AND IGNORES CONGRESSIONAL INTENT AND THE ADA'S EXPRESS LANGUAGE.

In several respects, the rule which Petitioners and the EEOC propose runs directly counter to the ADA's purposes as expressed in the statutory language.

A. By Petitioners' Approach, Most Americans Have "Disabilities" Under the ADA.

In its Findings and Purposes accompanying the ADA, Congress hailed the protection of 43 million Americans with disabilities, and declared the laudable goals of eliminating disability discrimination and bringing persons with disabilities into the mainstream of American society. 42 U.S.C. § 12101 (a). Far from bringing persons with disabilities in the mainstream, however, Petitioner's proposed rule would by definition force persons from the mainstream -- indeed, the vast majority of Americans -- into the ranks of persons with "disabilities."

The numbers alone reveal the fallacy of Petitioners' rule. For example, 147 million Americans, or 55% of the population, wear eyeglasses or other corrective lenses.² This

² *Caring for the Eyes of America*, the annual report of the American Optometric Association, St. Louis, Missouri (1998). In its amicus brief, the EEOC cites a government study which found that an even higher number of adults -- 63% -- wear eyeglasses or contact lenses. Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners, p. 10, n.1. Other statistics which

does not even include the persons who no longer wear corrective lenses due to successful corrective laser surgery. In most cases, these persons function normally in virtually all occupations. They fly airplanes, drive trucks, and even excel in professional sports. Yet, Petitioners and the EEOC declare that ameliorating measures should not be taken into account in determining whether an individual has a "disability" under the ADA.³ By this interpretation, conceivably 55% of the U.S. population -- individuals *without* their corrective lenses, a great many of whom could not function normally in their present jobs without eyesight correction -- falls within ADA coverage. Congress could not have intended to afford the ADA such a wide sweep.⁴

Indeed, the example of corrective lenses represents only the tip of the iceberg.

- The American Heart Association estimates that 96.8 million American adults (51%) have high cholesterol levels. Often, this condition is successfully controlled by cholesterol-lowering medication.
- As many as 50 million Americans have hypertension, according to the American Heart Association. Many take blood pressure medication that completely controls their condition.

appear below were derived from the official websites of the organizations cited: The American Heart Association (www.amhrt.org); the National Center for Health Statistics (www.cdc.nchswww/default.htm); the American Psychiatric Association (www.psych.org).

³ The EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act, an appendix to the EEOC's regulations, opines that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. 1630.2 (j). The regulations themselves are silent on the issue.

⁴ Congress viewed persons with disabilities as a "minority of the population." 42 U.S.C. § 12101 (a) (7).

- Nearly 15 million Americans have asthma, according to the National Center for Health Statistics. A large number of asthma sufferers function normally with the use of an inhaler to alleviate their condition.
- According to the American Psychiatric Association, in any six-month period 9.4 million Americans suffer from depression. One in four women and one in ten men can expect to develop it during their lifetime. As many as one in five Americans will suffer at least one episode of *major* depression during their lifetimes. Of those who suffer from depression, 80-90% can be effectively treated. Many persons who take antidepressants can and do remain fully functional.
- 28 million Americans have some degree of hearing loss -- but just over 2 million are profoundly deaf. (58 Fed. Reg. 64356 (1993)). Many millions of these individuals are fully functional, sometimes with hearing aids.
- The American Heart Association reports that approximately 8.7 million Americans have diabetes, with 625,000 new cases diagnosed each year. Most diabetics live relatively normal lives through the use of insulin and/or dietary measures.
- 37 million Americans have some form of arthritis (58 Fed. Reg. 5524, 5526-27 (1993)). Many take over-the-counter pain relievers and function fully.
- Many persons with seizure disorders take medication that fully controls their condition (i.e., they have not had a seizure in 10 years).
- Millions of persons with psychological needs are rendered fully functional by professional counseling.

- Persons with heart arrhythmia take anticoagulants to minimize the risk of a heart attack, and live and work as part of mainstream America.

These are but a few examples of persons with *potentially* debilitating conditions who, thanks to modern medicine, pursue normal lives and work in every kind of job imaginable. By and large, society does not view such persons as these, fully functional in all or virtually all respects, as having "disabilities." To do otherwise in order to stretch a statutory definition, as Petitioners and the EEOC urge, trivializes the ADA and its purposes. Worse, such a broad-brush approach distracts attention from the ADA's intended beneficiaries, those who truly have disabilities but who can still work and make significant contributions to society. A statute that protects everyone protects no one. Moreover, such indiscriminate labeling tends to heap suspicion and ridicule on the very persons whom the statute seeks to protect. This result runs directly counter to Congress's stated intent to protect individuals with disabilities from unequal treatment "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. §121101(a)(7).

In sum, with the ADA, Congress intended to protect a limited class of persons: specifically, those who suffer from substantial limitations significantly more severe than those encountered by the average person in everyday life, *not* those who suffer from relatively minor, widely shared non-limiting conditions. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (to hold otherwise would "debase" the "high purpose" of a statute that seeks to protect "those truly handicapped"); *Buko v. American Medical Laboratories, Inc.*, 830 F. Supp. 899, 904 (E.D. Va. 1992), *aff'd* 28 F.3d 1208 (4th Cir. 1994). In order to serve these legislative purposes, and to discourage rather than to feed negative stereotypes that the statute decries, employers and courts should consider individuals in

their actual state, with their *actual* substantial limitations, if any, and not in a hypothetical condition.

B. Considering the Individual's Actual Substantial Limitations is Most Consistent with the ADA's Definition of "Disability."

The ADA defines an actual disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2) (A). It does not say an individual has a disability if he or she has an impairment that *might* or *could* substantially limit a major life activity.⁵ Thus, a plain, common-sense reading of the statute requires a determination of whether an individual is currently or actually "substantially limited." If he or she is not substantially limited because of some reasonable mitigating measure, then that person should not be considered to have a "disability." Any other reading of the statute would not only corrupt its plain meaning, but would place an impossible burden on the lay business persons responsible for adhering to it.

The definition stresses actual function rather than theoretical condition, and individual assessment rather than blanket categorization. As this Court held last term in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L.Ed.2d 540 (1998), a physical impairment, including poor vision, must first be "substantially limiting" to the individual in order to rise to the level of "disability." 141 L.Ed.2d at 557 and 141 L.Ed.2d at 574 (O'Connor, concurring in the judgment in part and dissenting in part). Although a nearsighted person whose vision is corrected to 20/20 by corrective lenses, or a person with asthma who uses an inhaler, may have a "physical

⁵ Ignoring the beneficial effects of medical treatments, as Petitioners and the EEOC urge, reduces the statutorily-mandated disability equation to speculation and stereotypes about an impairment. If Congress wished to link protection to impairments alone, it would have -- but Congress instead added the individualized inquiry on "substantial limitations" to the disability definition.

impairment," neither impairment is, in reality, "substantially limiting" with respect to major life activities, thanks to simple medical devices. For all practical purposes, millions of persons benefitting from salutary effects of modern medicine are no different from the mythical "average person" -- against whom "substantial limitations" are measured. See 29 U.S.C. § 1630.2 (j) (1) (i) and (ii). Indeed, at 55% of the population (or 63% of adults), the "average person" uses corrective lenses.

Yet, Petitioners and the EEOC advocate imagining these persons in a theoretical condition, without their eyeglasses or inhalers. The EEOC's vacillating position in this very case illustrates the impossibility of maintaining one's balance on this logical tightrope. In its Certiorari Brief in *Sutton*, the EEOC correctly conceded that both the *Sutton v. United Air Lines* and the *Murphy v. United Parcel Service* cases present the identical question on "whether the existence of an *actual* disability under the ADA is to be assessed with or without taking into consideration mitigating or ameliorative measures employed by the individual involved." U.S. Brief as Amicus Curiae on the Petitions for Writs of Certiorari at 8 (emphasis added); see also *id.* at 13. The EEOC then argued that *Murphy* was the better vehicle to address the issue, or that the situation raised in *Sutton* should be avoided, because the example of correctable vision in *Sutton* may pose a "special" exception. *Id.* at 8, 13-14, fn. 3. The EEOC offered no reasoned explanation why mitigating measures should be considered only in the case of correctable vision impairments. Indeed, given the wide variety of accessible medical treatments for a wide variety of impairments, the same reasons that support creation of a "special exception" for corrective lenses also call for consideration of mitigating measures in many other cases. Apparently recognizing that this argument exposed the fatal flaws in its entire position, the EEOC then reversed field in its *amicus* briefs and argued against treating corrective lenses as an exception. The EEOC's own shifting positions beg the question of whether other measures which not only alleviate certain symptoms of

an impairment, but which virtually eliminate any "substantial limitations" emanating from the impairment, can be ignored in applying a statute dedicated to mainstreaming, and not segregating, persons with "disabilities." Such measures should not be ignored. They affect the way people actually function, as well as the way people are perceived as functioning.

This leads to yet another dissonance between the EEOC's position and the ADA's language. As the third prong of the ADA's definition of "disability" stresses, the *perception* of disability where none actually exists creates a new protected class that, but for the active imaginations of others, never had to exist. See 42 U.S.C. § 12102 (2) (C) ("disability" means "being regarded as having such an impairment [that substantially limits one or more of the major life activities of such individual]").⁶ Under the ADA, then, the employer should focus not on the least that individuals theoretically could do, but rather, on the most they actually *can* do. Yet, the EEOC's approach to mitigating measures would *require* the employer, through an imaginative leap, to perceive as "disabled" a person who functions normally. Thus, even aside from the practical difficulty or impossibility of asking employers to imagine functional persons in a hypothetical, less-functional state, such an exercise runs directly counter to Congress' purposes. Indeed, elsewhere the

⁶ As the EEOC's own interpretive guidance explains, "[a]n individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has *controlled* high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled." 29 C.F.R. Pt. 1630, App. § 1630.2 (l) (emphasis added). Also implicit in this guidance is the EEOC's observation that controlled conditions may not be "disabilities."

ADA and the EEOC encourage employers to view employees in their maximum and actual, present functioning capacity.⁷

In other contexts, including a case involving an employer unaware of an employee's medical condition, courts have correctly surmised that "[t]he ADA does not require clairvoyance." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995). Similar "clairvoyance" should not be required to picture functional persons as "substantially limited."

II. LEGISLATIVE HISTORY, OTHER EEOC INTERPRETATIONS, AND THE RECORD OF THE ADA IN PRACTICE SUPPORT RESPONDENTS' POSITION.

As explained above, the ADA's plain language only mandates protection of those who are "substantially limited," and not persons who "would be" or who are, hypothetically, "substantially limited." Similarly, the ADA's legislative history does not mandate protection of individuals who can function normally with mitigating measures. Indeed, the legislative history itself is inconsistent. At times, it indicates that disability should be determined without regard to mitigating measures. At other times, though, the legislative history indicates that the focus should be on an impairment's *effects* on the individual with the impairment, not on the impairment's qualities, and seems to indicate that it would be appropriate to consider mitigating measures.⁸ Thus the

⁷ The EEOC discourages other forms of speculation. As the EEOC's interpretive guidance on qualified persons with disabilities explains, "[t]his determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and *should not be based on speculation* that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs." 29 C.F.R. Pt. 1630, App. § 1630.2 (m) (emphasis added).

⁸ Parts of the ADA's legislative history suggest that Congress intended disability to be determined without regard to mitigating measures. H.R. Rep. No. 101-485 pt. 2, at 52 (1990), reprinted in 1990 U.S.C.A.N. 303, 334. Yet, a Senate report indicated that in determining

legislative history taken as a whole does not preclude consideration of mitigating measures in determining "disability."

The EEOC is equally inconsistent. While the agency argues that mitigating measures should not be taken into consideration when determining whether an individual has a disability, it is perfectly willing to consider mitigating measures in other circumstances under the ADA. For example, in addressing "reasonable accommodations," the EEOC correctly explains that it is the individual's known functional limitations -- and not the underlying "impairment" -- that must be accommodated. 29 C.F.R. § 1630.9 (a). See also "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Questions 5, 38.

The glaring contradictions of the EEOC's positions on mitigating measures are most evident in its approach to negative side effects of medication. In its Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, the EEOC unequivocally states, "If medications cause negative side effects, these side effects *should be considered* in assessing whether the individual is substantially limited," (emphasis added). *Accord, Christian v. St. Anthony Medical Center*, 117 F.3d 1051, 1052 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1304 (1998). The EEOC reiterates this position in its March 1999 Policy Guidance on Reasonable Accommodation Under ADA, explaining that "[t]he side

whether a disability exists, the focus should be on an impairment's effects on the individual with the impairment, not on the impairment's qualities. S. Rep. No. 101-116 at 22-23 (1989). The same report noted that an individual who wears a hearing aid could be "regarded as" disabled even if the hearing aid compensated for the impaired hearing. *Id.* at 24. If such an individual were covered under the "substantially limited" language of the definition of disability without regard to the mitigating measure (hearing aid), there would have been no need to look to the "regarded as" portion of the definition. 29 C.F.R. § 1630.2 (g). That is, others' perceptions concerning the hearing aid would be irrelevant unless the individual's hearing were not covered by the "substantially limited" language.

effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability." "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Question 38. By way of example, the Guidance on Psychiatric Disabilities states that if an employee with major depression is often late for work because of medication side effects that make him extremely groggy in the morning, the employer, absent undue hardship, must consider offering a reasonable accommodation such as allowing him to come into work one hour later each day. On the other hand, that same Guidance also unequivocally states that the "corrective effects of medications" should *not* be considered in deciding if an impairment is so severe that it substantially limits a major life activity. It defies logic for the EEOC and ADA claimants to have it both ways. SHRM's approach would eliminate these inconsistencies.

In another nod to practical functionality, the EEOC and the courts have agreed that short-term conditions are not considered "substantially limiting," and thus are not ordinarily classified as handicaps or disabilities covered under the Rehabilitation Act or the ADA. 29 C.F.R. Pt. 1630, App. 1630.2(j); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997); *McDonald v. Pennsylvania*, 62 F.3d 92, 96 (3rd Cir. 1995). Again, the emphasis is on common-sense notions of what constitutes a disability, and the idea that temporary conditions do not qualify. Most people who take medication or wear corrective devices do so on a habitual basis, and any departure from routine is typically brief -- analogous to a temporary condition.⁹

⁹ Rehabilitation Act cases decided prior to the ADA support Respondents' position that ameliorative measures belong in the disability equation. See *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (evaluated plaintiff in actual, medicated state, not a hypothetical, unmedicated state); *Trembaczynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. 1987) (officers do not have "handicaps" if vision is correctable to 20/20). Cases decided under the Rehabilitation Act since ADA offer little if any additional guidance. As under the ADA, courts

Accordingly, taking the ADA's legislative history and pre-ADA cases as a whole, nothing definitively endorses Petitioner's approach or precludes that of Respondent. On the other hand, the checkered history of the ADA in practice strongly commends Respondents' proposed rule. The chaos that preceded the statute has only grown since its enactment. It has spawned a legion of litigation, and has sown discord and confusion among employees as well as employers.¹⁰ A clear and simple rule, such as the one Respondent proposes, will establish a consistent principle that lay persons can understand and follow. It is a rule that employers can live with and employees can work with. Most important of all, it is a rule whose implementation will serve the original purpose of the ADA: to assure that employers, and society as a whole, will view all individuals at their best and not their worst, and as they actually function.

split on whether to consider mitigating measures in determining handicap are split. See, e.g., *Mackie v. Runyon*, 804 F.Supp. 1508, 1510-11 (M.D. Fla. 1992) (bipolar disorder stabilized by medication is not substantially limiting); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993) (an insulin-dependent diabetic did not have a disability), *reh'g, en banc, denied*, 9 F.3d 105 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994). Cf. *Tiff v. Secretary of Transp.*, 1994 WL 579912, at *3-4 (D.D.C. 1994) (depression controlled by medication was a disability); *Gilbert v. Frank*, 949 F.2d 637, 641 (2nd Cir. 1991) (an individual who could not function without kidney dialysis had a substantially limiting impairment). Thus, although this Court stated in *Bragdon* that the ADA provides no less protection than the Rehabilitation Act, 141 L.Ed.2d at 553, the issue was never conclusively decided under the Rehabilitation Act.

¹⁰ The EEOC argues that adopting SHRM's position "would inject uncertainty and instability into the system. See 97-1943 U.S. Brief at 8; 97-1992 U.S. Brief at 16-17. Yet, actual experience has shown that the EEOC's approach to this issue has itself created that unhappy result. A consistent rule based on actual observation and function, rather than on prediction and speculation, will far more likely contribute to a stable system.

III. CONSIDERING MITIGATING MEASURES WILL STILL PROTECT PERSONS WITH DISABILITIES

Contrary to Petitioners' and the EEOC's contentions, SHRM's approach would not set such a restrictive definition of "disability" as to gut the ADA and leave virtually no individuals subject to its protections. Rather, SHRM's rule prevents ADA compliance from becoming a free-for-all haven for every individual with some minor, correctable physical or mental condition and focuses the ADA's protections on the individuals Congress intended to protect. The effect of each individual's condition, as well as the effect (both good and bad) of any medical treatment or device, should all be taken into account as they affect the ability to function.

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2) (A). "Substantially limits," as defined by the EEOC, means:

Unable to perform a major life activity that the average person in the general population can perform; or

Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1620.2(j)(1)(i and ii). More significantly, as the Court observed in *Bragdon*, "the Act addresses substantial limitations on major life activities, not utter inabilities." 141 L.Ed.2d at 559. "When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.* Under SHRM's proposed interpretation, an employer or court confronted with an individual claiming to have a disability and to be subject to the ADA's protections would first determine if the

employee's abilities during the relevant time period demonstrate a substantial limitation of a major life activity as compared to the "average" person.¹¹ It is the individual's present ability, as affected by the impairment and any side effects of medication or treatment, that would be the focus of the examination. Courts and employers would not be expected to speculate about what the individual's limitations could be if untreated (or create hypothetical limitations where none currently exist).

Borrowing the EEOC's generalized example used on page 14 of its Amicus Brief in *Murphy v. United Parcel Service, Inc.*, an employee who requires a modification of his work to accommodate an uncontrollable condition would be entitled to the modification (provided it is reasonable, effective and did not cause an undue hardship to the employer). If another employee's condition is somewhat controlled (but still substantially limiting), the employee would also be entitled to reasonable accommodation from the employer. Nevertheless, an employee whose medication eliminates an impairment would not be entitled to an accommodation as none would be needed.¹²

¹¹ The EEOC's interpretation creates additional conflicts and questions. For example, when determining what the "average" person can do, are the "average" person's abilities examined with or without mitigating measures? If the "average" person's abilities are examined with mitigating measures, then it is possible that every individual (or a majority of individuals) could be classified as having "disabilities" since they would be substantially limited in some major life activity (without mitigation) that the "average" person could perform (with mitigation). If the "average" person's abilities are examined without mitigating measures, then courts and employers will be forced to speculate twice -- first, with regard to the individual's limitations in the absence of mitigation and, again, with respect to the "average" person's abilities in the absence of mitigation.

¹² The EEOC complains in its example that employers would be free to discharge employees who sought permission to take medication or treatment that eliminates their condition. Such unfounded concerns ignore several key principles. First, the EEOC attempts to paint an improbable

SHRM's proposed standard when applied to real life examples proves that the EEOC's proposed interpretation is unneeded, and that individuals whose condition and/or treatment substantially limits a major life activity will be protected by the ADA. In the case of human immunodeficiency virus ("HIV"), this Court determined that an individual's HIV infection rises to the level of a disability. This Court noted the "predictable and, *as of today*, an unalterable course" of the disease on an individual's immune system. *Bragdon*, 141 L.Ed.2d at 554 (emphasis added). With or without protease inhibitors, part of the combination therapies that help keep many persons with HIV healthy for longer, the retrovirus' genetic material becomes integrated with the chromosomes of the body's cells. *Id.* The latent viral reservoir of HIV slowly attacks the immune system even though anti-retroviral therapies can prolong persons' disease-free states. These particular "mitigating measures" therefore do not eliminate the "substantial limitations" on the major life activities that the Court discussed and appeared willing, but unable, to discuss in *Bragdon*. Moreover, this vigorous medical regimen exacts other real costs and limitations on the individuals undergoing combination therapies. The regimen itself requires strict adherence to diet and medication schedules. Acute side-effects associated with the treatment

picture of some Orwellian employer who fires employees for taking prescribed medication. The EEOC is attempting to push the protections of the ADA into areas Congress never intended it to cover. Everyone would equally be offended if an employer fired an employee for taking aspirin because the employee had a headache. Yet, an employee with a one time headache who is taking aspirin would not have a "disability" under any standard adopted by the Court. Second, an employee's restricted regimen of treatment (that, for example, required a certain diet and timing for the taking of medication) may substantially limit a major life activity and still allow the employee to be protected by the statute. Finally, Congress and individual states have already adopted legislation protecting the employee's ability to seek and receive medical treatment (such as the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et. seq.*, the Occupational Safety and Health Act, 29 U.S.C. §§ 561, *et. seq.* and state leave and workers compensation laws).

may include nausea, diarrhea, and neuropathy (numbness in the extremities). In the everyday context of the workplace, it is more often these disruptive regimens and the individual side-effects that human resource professionals must accommodate than the underlying viral infection itself.¹³ There is every reason to believe that, in viewing the HIV-positive employee in the actual condition that must be accommodated under ADA, the person is still "substantially limited" even with the mitigating treatments and is therefore protected under the ADA.

This example, as in the case of persons with prosthetic legs or using a wheelchair, shows that under SHRM's proposed rule, the persons intended to be protected under ADA may still be "substantially limited," protected, and entitled to reasonable accommodations even when helpful medical treatments and devices -- which affect the actual condition and functional limitations of the individual -- are taken into account.

CONCLUSION

The Court should resolve the inconsistencies in the courts below and the internal contradictions in the Petitioners' and EEOC's position by articulating a clear, simple rule: For purposes of determining "disability" status under the ADA, individuals should be assessed in light of their actual ability to function and any actual "substantial limitation" to their major life activities. The assessment should take into account both the beneficial and detrimental effects, if any, of measures, devices and treatments used to ameliorate or eliminate the condition in question. This principled, common-sense

¹³ The EEOC's new guidelines on reasonable accommodations even explain that it is these limitations from treatments that must be accommodated. "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Question 22, example A (citing limitations and side effects from HIV treatment regimen to be accommodated).

approach will facilitate employers' ADA compliance, while also protecting those whom Congress intended to protect.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN L. MURPHY, PETITIONER,

v.

UNITED PARCEL SERVICE, INC., RESPONDENT.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

**BRIEF AMICUS CURIAE FOR THE AMERICAN
TRUCKING ASSOCIATIONS AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS, ET AL.,
IN SUPPORT OF RESPONDENT**

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QUESTIONS PRESENTED

The *amici curiae* will address the following questions:

1. Whether assessment under the Americans with Disabilities Act of a plaintiff's limitations must include consideration of corrective measures that ameliorate the effects of an impairment on major life activities.
2. Whether, when an employer terminates an employee because that employee fails to satisfy an objective job requirement as the result of a medical condition, that employer necessarily regards the employee as disabled.

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**BRIEF AMICUS CURIAE OF THE AMERICAN
TRUCKING ASSOCIATIONS AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS, ET AL., IN
SUPPORT OF RESPONDENT**

INTEREST OF THE AMICI CURIAE¹

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The American Moving & Storage Association ("AMSA") is the national trade association of the moving and storage

¹ The written consents of the parties to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

The Towing & Recovery Association of America ("TRAA") is a national association of more than 1,400 towing and recovery operators serving North America. TRAA is charged with promoting professionalism, quality customer service, and safety in towing operations throughout the country.

The Specialized Carriers & Rigging Association ("SC&RA") is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

The Truckload Carriers Association ("TCA") is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

The National Tank Truck Carriers, Inc. ("NTTC") is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

The Association of Waste Hazardous Materials Transporters ("AWHMT") is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

The National Automobile Transporters Association ("NATA") represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interest of its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

The issues at stake in this case are of direct concern to *amici* and their members. *Amici* strongly support, and are deeply committed to, equality of employment opportunity for all persons and believe that unlawful discrimination in all forms should be eliminated from the workplace. At the same time, members of *amici*, as employers of millions of workers, have a large stake in ensuring that the provisions of the Americans with Disabilities Act are correctly and fairly applied.

If this Court reverses the Tenth Circuit's decision and excludes mitigating measures from the disability determination, individuals whose medicated or otherwise corrected conditions do not significantly restrict their functional abilities could qualify as "disabled" persons entitled to the ADA's full panoply of protections. Such an expansion of the term "disability" would ignore the statutory requirement that an impairment "substantially limit" one or more of a person's major life activities. At odds with congressional intent, it would automatically turn a huge segment of the American population into "disabled" persons covered by the Act, undermining the ADA's goal to eliminate discrimination

against the truly disabled. *Amici* have strong interests in establishing a fair and workable standard of disability that, by taking into account internal and external mitigating factors, encompasses only those persons who are truly limited in a major life activity.

STATEMENT

Petitioner Vaughn Murphy has lived with high blood pressure for most of his life. Pet. App. 2a, 13a. He experiences virtually no limitations from his hypertension because he controls the condition with medication. *Id.* at 4a, 13a. Murphy's extensive employment history exemplifies the lack of constraints that his high blood pressure places on his daily life. Prior to applying for a mechanic position with respondent United Parcel Service ("UPS") in 1994, he had worked in mechanic jobs for over 22 years. *Id.* at 13a. As his doctor testified, Murphy "functions normally doing everyday activity that an everyday person does." *Id.* at 4a.

Unlike Murphy's previous mechanic jobs, however, the UPS position involved some driving and so required medical certification pursuant to Department of Transportation ("DOT") regulations. Those regulations mandate that commercial vehicle drivers maintain blood pressure of 160/90 or lower. They exist to ensure that every driver on the road can operate vehicles safely. Pet. App. 3a & n.1, 14a-16a; 49 C.F.R. §§ 391.41(b)(6), 391.43. Murphy knew that he would have to pass DOT physical standards to secure the job with UPS. Pet. App. 13a. Yet Murphy has never been—and will never be—capable of reducing his blood pressure to the necessary level. *Id.* at 16a.

When Murphy took his pre-employment DOT physical in August 1994, his blood pressure was 186/124, well above the maximum permissible. Nonetheless, the testing clinic erroneously issued Murphy a DOT health card, which

allowed him to begin work at UPS. In September 1994, while reviewing employee medical records, the UPS medical supervisor discovered the clinic's mistake. Pet. App. 2a-3a, 16a. UPS had Murphy's blood pressure tested again, but it was still above the DOT standard. *Id.* at 17a. Because Murphy could not obtain DOT certification, UPS terminated him. *Id.* at 3a, 17a. A few weeks later, Murphy found a mechanic position, which did not require DOT certification, with another employer. *Id.* at 17a.

Murphy filed suit in the United States District Court for the District of Kansas, claiming that UPS violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, by terminating him due to his hypertension. Pet. App. 9a. The district court granted UPS's motion for summary judgment. The court held that in determining if Murphy had a "disability," his condition must be assessed in its medicated state. *Id.* at 23a-32a. Because the evidence showed that Murphy experienced no significant restrictions from his hypertension, the court decided that "a rational fact-finder would be unable to conclude that Murphy's high blood pressure constitutes a disability." *Id.* at 31a. The court also held that "UPS did not regard Murphy as disabled, only that he was not certifiable under DOT regulations." *Id.* at 32a.

The Tenth Circuit affirmed, holding that Murphy was not disabled and that UPS did not regard him as disabled. Pet. App. 2a, 5a. Examining the impact of Murphy's *medicated* hypertension, the court concluded that he was not substantially limited in any major life activity. His condition did not affect his daily life. In addition, UPS did not "regard Mr. Murphy as having an impairment that substantially limits a major life activity"; it terminated him because his blood pressure exceeded DOT requirements. *Id.* at 4a-5a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Americans with Disabilities Act sets out three ways in which to qualify as "disabled": (i) by having an actual disability, (ii) by having a "record of" disability, and (iii) by being "regarded as" disabled. 42 U.S.C. § 12102(2). Excluding mitigating measures from the evaluation of whether someone is "actually disabled" twists the first of these alternate definitions to create a new, unintended class of ADA beneficiaries: those who are not in fact disabled, but who could *create* a disability if they were to cease alleviating their health conditions with medications or assistive devices.

To include such hypothetically restricted persons within the reach of the ADA is to read out the statutory requirement that the "impairment * * * *substantially limits*" the individual. 42 U.S.C. § 12102(2)(A) (emphasis added). Under petitioner's approach, a plaintiff does not have to establish that he is currently severely limited in a major life activity, or even that he is limited at all; it is enough that his underlying condition, untreated, would have that effect. By honing in on the conditions themselves instead of the plaintiff's functional limitations, this interpretation of the ADA also eradicates the statute's emphasis on the "individual": the plaintiff is in effect replaced by his disorder.

Since the statute itself precludes omitting mitigating measures from the disability determination, the legislative history and EEOC interpretive guidelines cannot be invoked to assert otherwise. In any event, the congressional reports bolster the plain reading of the statutory text. And the EEOC guidelines have little value because they are internally contradictory and create an unsound distinction between internal and external compensating factors.

Besides nullifying the statutory text, the removal of mitigating measures from the analysis of "disability" unjustifiably extends ADA coverage to people with non-limiting, widely-shared impairments. This distorts the Act's legitimate anti-discrimination goals and disrupts the even-handed distribution of its benefits. Although plaintiffs with uncorrectable impairments must still demonstrate that they are substantially limited, those with correctable conditions can qualify for protection despite their lack of actual restrictions.

Finally, petitioner cannot resort to the "regarded as" prong in an attempt to show that he is disabled under the ADA. That definition of disability applies when an employer acts due to misperceptions about the plaintiff's abilities, not when the plaintiff fails to meet an objective and valid standard.

ARGUMENT

I. MITIGATING MEASURES MUST BE CONSIDERED IN DETERMINING IF AN INDIVIDUAL IS DISABLED UNDER THE AMERICANS WITH DISABILITIES ACT

A. To Give Meaning To The Statutory Phrase "Substantially Limits," Courts Must Incorporate Mitigating Measures Into The Assessment Of Disability

As this Court "has stated time and again," "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The first of the ADA's definitions of disability provides that a person is disabled if he has "a physical or mental impairment that *substantially limits* one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (emphasis

added). The ordinary and natural meaning of these words is that this subsection covers only those individuals whose impairments actually place "substantial limitations" on the performance of life activities. But if the disability determination is conducted without regard for mitigating measures, impairments that have the potential to impose restrictions or may hypothetically do so are subsumed within the ADA. See *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part); *Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, No. 97-1943 (Jan. 8, 1999). Because that construction offends the plain language of the statute, it must be rejected.

By defining a disability as an impairment that "substantially limits" the individual, the ADA on its face is concerned with severe restrictions in functioning. 42 U.S.C. § 12102(2)(A). See *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (the "ordinary or natural meaning of 'substantially limits' requires that an impairment significantly restrict an individual's ability to perform a major life activity"); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) ("not every impairment that affect[s] an individual's major life activities is a substantially limiting impairment"). If mitigating measures are ignored, the effect is to pretend that such restrictions exist when, in fact, they do not. As the court below recognized, individuals who use medications or other compensating mechanisms to control their conditions so that they can "function[n] normally," do not endure severe limitations in their daily lives. Pet. App. 4a. See *Sutton*, 130 F.3d at 902-903 (when wearing glasses, plaintiffs with poor vision could "go about all their normal daily activities" in the "same or similar" manner as the majority of the population and, therefore, were not disabled); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (plaintiff who could "perform normal

daily activities" was not disabled). Thus, conferring benefits on that group of plaintiffs destroys the boundary delineated by the statute between those who suffer profound constraints from their conditions and those who are merely impaired. See *Dutcher v. Ingalls Shipbuilding, Inc.*, 53 F.3d 723, 726 (5th Cir. 1995) (a physical impairment, "standing alone," is not equivalent to a disability as contemplated by the ADA); *Kelly v. Drexel Univ.*, 94 F.3d 102, 108 (3d Cir. 1996) (same).

The facts of this case aptly illustrate how petitioner's approach eliminates the requirement that an impairment "substantially limit" an individual. With medication to reduce his high blood pressure, Murphy can do "everyday activity that an everyday person does." Pet. App. 4a. The medication is so effective that for over 22 years—and up to the present day—he has been able to work at various mechanic jobs for which he does not need DOT certification. *Id.* at 13a, 17a. Granting Murphy relief just because his unregulated blood pressure averages 250/160 (a condition he never experiences) would render meaningless all this evidence of his ample functional abilities. To say that *despite* his capacity to engage in usual activities and *despite* his full employment history, he is somehow "substantially limited" guts the Act of those words. See *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 857 (11th Cir. 1998) (teacher who worked as an educator and administrator for 20 years was not substantially limited by her physical impairments); *Still*, 120 F.3d at 52 (numerous jobs plaintiff had held demonstrated that he was not legally disabled); *Roth*, 57 F.3d at 1455 (plaintiff's past work experience as a pharmacist, attorney, and university lecturer repudiated his claim that he was significantly restricted in seeing).

The ADA also directs courts to inquire into the "limits" that a condition imposes on the "major life activities of [the]

individual." 42 U.S.C. § 12102(2)(A) (emphasis added). This compels an analysis of whether an impairment produces significant disadvantages for the particular person who is seeking to invoke the protections of the Act. See, e.g., *Sutton*, 130 F.3d at 897 (the statutory phrase "with respect to the individual" signifies that there must be an individualized, case-by-case assessment of whether a given impairment amounts to a substantial limitation); *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 963 (7th Cir. 1996) ("It is precisely because there are usually many person-specific considerations that are relevant to the issue of disability that we have held that the finding should be based on an individualized inquiry and is 'best suited to case-by-case determination'"). In order to undertake such an evaluation, it is necessary to fully account for all the circumstances of the person's specific situation, including the impact of any aids or medications upon his daily life.²

A rule that disability is determined without reference to mitigating measures would transform what should be an individualized appraisal of a plaintiff's true capabilities into generalizations about how the impairment in question typically affects people who are not taking medication or using assistive devices. See *Gilday*, 124 F.3d at 767 (Ken-

² This emphasis easily disposes of the Government's criticism that taking mitigating measures into account brings "a strange instability to the definition of disability" inasmuch as their effectiveness for, and use by, an individual may "vary * * * over time." In concentrating on the individual impact of an impairment, the ADA accepts that not everyone with a particular condition will qualify as "disabled" and that if the severity of a person's condition changes, his ADA status may as well. Thus, the "instability" that the Government is worried about already exists and is an integral feature of the statutory scheme. If Congress thought such results were intolerable, it would have defined "disability" differently.

nely, J., concurring in part and dissenting in part) (if we fail to consider mitigating measures, "we can not make an individualized comparison to the average person in the general population"). The plaintiff's condition would be looked at in the abstract, not in terms of the challenges it presents for him day to day. That impermissibly substitutes mere medical diagnoses for the ADA's focus on the plaintiff's own functional limitations.

If Congress had intended for disorders alone to constitute "disabilities," it could have said so in the statute. Instead, Congress chose a functional definition of disability, giving full recognition to the fact that "there are varying degrees of impairments as well as varied individuals who suffer from impairments." *Homeyer*, 91 F.3d at 962 (the ADA precludes a finding of disability based on "categories of impairments"); see also 136 Cong. Rec. 9072 (1990) ("The ADA includes a functional rather than a medical definition of disability"); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 872 (2d Cir. 1998) ("the determination whether an impairment 'substantially limits' a major life activity is fact specific").

Seeking to circumvent the plain language of the ADA, the petitioner and his *amici* contend that the statute's structure warrants the exclusion of mitigating measures when deciding if a plaintiff is "disabled." The Government in particular stresses that mitigating measures should be examined after the initial judgment as to disability because that is the way the statute handles "reasonable accommodations." Otherwise, the Government submits, there is a "disincentive to self-help" in that individuals who utilize mitigating measures will not be accorded protection, while those who await reasonable accommodations will be (citing *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854 (1st Cir. 1998)).

This reasoning is flawed. First, the "reasonable accommodations" that employers must supply to their qualified, disabled employees do not include personal items, such as medications, eyeglasses, or hearing aids. H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess., at 64 (1990); S. Rep. No. 116, 101st Cong., 1st Sess., at 33 (1989). Hence, Congress has already concluded that the onus is on employees in the first instance to help themselves. Second, it is highly improbable that individuals will forego allaying the effects of their conditions just to secure coverage under the ADA. Many individuals may have no choice but to invest in mitigating measures. Petitioner himself claims that without his medication he would have to be "hospitalized" and would "eventually die from [his] high blood pressure." Pet. 7. The suggestion that Murphy (or even those who would face less serious consequences) would risk his well-being or reduce his quality of life for the sake of potential benefits under the ADA is simply not plausible.

The Government's further argument that evaluating an impairment in its untreated state is the only way to effectuate the ADA's "reasonable accommodation" mandate is similarly unconvincing. The Government incorrectly posits that, absent such a rule, employers would not have to adjust the workplace for employees who request accommodations necessitated by their use of mitigating measures, stating that "[i]n many employment situations, giving the employee a brief break so that the employee could take * * * medication would be a reasonable accommodation." Clearly, in unusual situations the need to take corrective measures to alleviate a condition might itself interfere so greatly with normal life activities as to render an individual disabled and might require reasonable accommodation. But that does not mean that someone who simply has to take a pill periodically (or put on glasses or a hearing aid) is disabled. Taking account of mitigating measures recognizes the difference between

these individuals; it does not deprive truly disabled employees of required accommodations.

B. Legislative And Administrative Sources Do Not Undercut The Statutory Directive That Mitigating Measures Be Factored Into The Disability Determination

1. The legislative history does not support disregarding a plaintiff's use of medications or medical devices

Unambiguously, the ADA defines as disabled only those individuals who are in fact "substantially limited." The Act's words can be given effect only by incorporating mitigating measures into the disability determination. There is no need to "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994). "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

Even if the statute were ambiguous, the legislative history does not justify disregarding mitigating measures. Petitioner and his *amici* rely heavily on the statement in both committee reports that, under the ADA's first prong, "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." H.R. Rep. No. 485, Pt. II, at 52; S. Rep. No. 116, at 23. It is wrong, however, to construe that statement as supporting the exclusion of mitigating measures.

"Reasonable accommodations" and "auxiliary aids" are terms of art. They are specifically defined in the statute as job-assistive devices furnished by employers, not employee-supplied mitigating measures. 42 U.S.C. § 12111(9) (exam-

ples of reasonable accommodations are "the provision of qualified readers or interpreters," the "acquisition or modification of equipment or devices," and other "similar" accommodations); 42 U.S.C. § 12102(1) (listing the same measures as "auxiliary aids"). Consistent with these definitions, the congressional reports themselves stress that "personal use items such as hearing aids or eyeglasses" do not fall within the definition of reasonable accommodations. H.R. No. 485, Pt. II, at 64; S. Rep. No. 116, at 33.

Consequently, the simple message of the congressional reports, which is amply supported by the statutory language, is that employer-provided job-assistive measures are not taken into account in determining whether a person is disabled. The passage in question says nothing at all to suggest that employee-provided measures that are not specifically job-related but that serve to mitigate the employee's medical condition are irrelevant to determining disability.

Another passage of the Senate Report supports this conclusion. Explaining the purpose of the "regarded as" prong of the ADA, the Senate Report states:

Another important goal of the [regarded as] prong of the definition is to ensure that *persons with medical conditions that are under control, and that therefore do not currently limit major life activities*, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S. Rep. No. 116, at 24 (emphasis added). This passage clearly conveys that individuals who can adequately compensate for their impairments are not disabled under the ADA's first prong, 42 U.S.C. § 12102(2)(A), and must turn to the

"regarded as" prong if they wish to qualify as disabled. And it can only mean that gauging whether someone has a disability under subsection (A) requires looking at the individual's level of functioning with the benefit of ameliorative or corrective measures.³ Consequently, taken as a whole, the legislative history advances rather than detracts from the position that mitigating measures are an indispensable part of the disability determination.⁴

³ The Government (at footnote 2) contends that the Senate Report cannot be interpreted as precluding someone with a controlled condition from falling within the actual disability prong of the ADA because an individual may be "disabled" under both that prong and the "regarded as" prong. That explanation is unavailing: the Senate Report expressly says that the *very reason* a person with a mitigated impairment must resort to the "regarded as" prong is that his impairment is controlled and, *as a result*, he is "not currently limit[ed] [in] major life activities." S. Rep. No. 116, at 24. Moreover, if people with controlled conditions could fit under the actual disability prong, the "regarded as" prong would not be needed to serve the "important goal" (*id.*) of protecting their interests.

⁴ The House Report at one point suggests that individuals who use hearing aids or take medication are considered substantially limited "even if the effects of the impairment are controlled." H.R. Rep. No. 485, Pt. II, at 52. But these examples are at odds with the House Report's own description of reasonable accommodations as job-related aids, with the Senate Report and, most important, with the plain language of the statute itself. They should therefore be disregarded. At best, the House Report adds confusion, not clarity, to the issue of mitigating measures.

2. The EEOC's guidelines warrant no deference because they conflict with the statutory text and are internally inconsistent

The EEOC addresses mitigating measures only in interpretive guidelines issued as an appendix to the ADA regulations. The guidelines state that mitigating measures should be omitted from the analysis of whether a plaintiff is "disabled." 29 C.F.R. pt. 1630.2(j) app. However, this "guidance" should be rejected because it conflicts with the plain meaning of the ADA, as well as other portions of the appendix, and establishes a faulty distinction between internal and external mitigating measures.

It is unnecessary to decide what weight should be accorded to the EEOC guidelines, because they do not survive even the highest level of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).⁵ The guidelines' statement that "whether an individual is substantially limited in a major life activity must be made * * * without regard to mitigating measures, such as medicines, or assistive or prosthetic devices," we have already shown, directly contravenes the ADA's mandate that

⁵ Nevertheless, the EEOC guidelines ought not to carry the same force of law as the regulations themselves because they are purely interpretive rules. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive guidelines are not entitled to the same deference as regulations); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("a court is not required to give effect to an interpretative regulation"). Most circuit courts confronting this issue have agreed. See *Arnold*, 136 F.3d at 864; *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Washington v. HCA Health Servs., Inc.*, 152 F.3d 464, 469-470 (5th Cir. 1998); *Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part); *id.* at 763 n.2 (Moore, J., minority opinion); *Sutton*, 130 F.3d at 899 n.3.

an individual experience "substantial limitations" from a medical condition. Since "[n]o deference is due to agency interpretations at odds with the plain language of the statute itself," the guidelines must be rejected. *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989); see also *Gilday*, 124 F.3d at 767 (Kennedy, J. and Guy, J., concurring in part and dissenting in part) (declining to defer to EEOC guidance because it "conflicts with the text of the ADA" and thus is not a "'permissible construction of the statute'"); *Sutton*, 130 F.3d at 901 n.8 (listing numerous courts that have refused to defer to the EEOC guidelines because they conflict with the statute); *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

Furthermore, the EEOC guidelines are self-contradictory. To begin with, like the Senate Report, the guidelines indicate that someone with a "controlled [condition] that is not substantially limiting" would fit within the definition of "regarded as" disabled—assuming all other elements of the claim were met. 29 C.F.R. pt. 1630.2(l) app. The district court clearly explained the "tension" this statement produces within the EEOC's guidance (Pet. App. 26a):

This section appears to be at odds with interpretative guidelines found in § 1630.2(j). Under § 1630.2(j) of the EEOC's interpretive guidelines, a person's unmedicated high blood pressure would constitute a disability. Yet, the interpretative guidelines in § 1630.2(l) implicitly suggest that a person who has controlled his blood pressure by medication does not have a disability; if this were not so, why would a person suffering from high blood [pressure] ever have to look to the "regarded as" section of the ADA to prove the existence of a disability?

In addition, part 1630.2(j) (app.) recognizes that “whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” Inconsistently, the EEOC would bar courts from evaluating the effects of mitigating measures, even though it is impossible to assess the true impact of an impairment on an individualized basis without taking such measures into account.

The value of the EEOC guidelines is further reduced because they are, at least in one respect, irrational. All of the guidelines’ examples of “mitigating measures” are external compensations—medicines and medical devices. 29 C.F.R. pt. 1630.2(j) app. This suggests that internal, or personal, adaptations *should* be factored into the disability determination. See *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (plaintiff was not “substantially limited” because she had “trained herself” to do “‘all of the basic things’ she needs to do in life with her [injured] arm”); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1449, 1455 (7th Cir. 1995) (plaintiff was not disabled where his visual condition was not completely correctable with lenses, but he had “‘adapted well to daily activities’”).

We agree that internal adjustments must be taken into account when ascertaining whether a person is disabled. See Brief *Amicus Curiae* of American Trucking Associations, *et al.*, filed in *Albertsons, Inc. v. Kirkingburg*, No. 98-591. But there is no defensible reason for drawing a line between internal and external mitigating measures. Since internal and external corrections similarly affect the extent to which a limitation interferes with life activities, both should be considered in the “disability” decision. Murphy is not “substantially limited” because he manages his hypertension with medication. Another person may not have a disabling

impairment because he can lower his blood pressure through relaxation techniques. Likewise, one person may wear corrective lenses to improve his vision, whereas another may have developed subconscious mechanisms that alleviate the effects of his poor eyesight, so that neither is restricted in carrying out everyday tasks. In every instance, the end result is identical—the person is not substantially limited in major life activities. By creating this untenable distinction between internal and external compensating measures, the EEOC guidelines arbitrarily dole out protection under the ADA.

C. Ignoring Mitigating Measures Expands The ADA Well Beyond Its Intended Scope By Affording Protection To A Widespread Group Of Individuals With Non-Limiting Impairments

The approach to determining disability urged by petitioner and his *amici* has far-reaching practical consequences. It would expand the ADA’s definition of disability to include individuals who, because of their use of medication or other corrective measures, do not currently experience substantial limitations from their impairments. Individuals who have non-limiting or mild impairments could then take advantage of the ADA’s remedial provisions, despite Congress’s express directive to the contrary. Congress could not have been more clear, both in the statutory language it chose and in the committee reports, that “minor, trivial impairment[s]” are *not* within the scope of the Act. S. Rep. No. 116, at 23; H.R. Rep. No. 485, at 52.

Courts have frequently observed that “[i]t would debase [the] high purpose [of the ADA] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.” *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997); see also *Patrick v. Southern Co. Servs.*, 910 F. Supp. 566, 567 (N.D.

Ala.) ("Much of the criticism of the ADA in practice has come from the truly disabled who recognize that * * * attempted stretches [of the definition of disability] can cause negative reaction to the Act and perhaps undermine its true purposes"), *aff'd*, 103 F.3d 149 (11th Cir. 1996). But if all it takes to be covered under the ADA is a correctable condition that, unmitigated, would interfere with everyday tasks, a huge segment of the population would unjustifiably be swept under the umbrella of the statute.

One in four adult Americans has high blood pressure, which is "easily detected and usually controllable." American Heart Association, *1999 Heart and Stroke Statistical Update—High Blood Pressure* (visited Mar. 12, 1999, at <http://www.amhrt.org/statistics>). Approximately half of those persons are on medication, and a quarter have their hypertension completely under control. *Ibid.* That results in between 15 to 25 million additional people who may be "disabled" due to their underlying (not their actual) conditions under petitioner's theory of ADA disability. *Ibid.*

Other common problems that are likewise easily remedied are visual deficiencies and hearing impairments. In the United States, "more than 100 million people need corrective lenses to see properly." National Advisory Health Council, *Vision Research—A National Plan: 1999-2003*, at 7, U.S. Dep't of Health and Human Servs., NIH Pub. No. 98-4120. And more than 28 million people have hearing loss, 15% of whom use hearing aids. National Institutes of Health Consensus Statement Online, *Noise and Hearing Loss* (Jan. 22-24, 1990) (visited Mar. 12 1999, at <http://odp.od.nih.gov/consensus/cons/hearing.htm>); National Center For Health Statistics, *Number of Persons Using Assistive Technology Devices by Age of Person and Type of Device: United States, 1994*, Centers for Disease Control, Table 1

(visited Mar. 16, 1999, at http://www.cdc.gov/nchswww/about/major/nhis_dis/ad292tb1.htm).

Examining these individuals without their medication or assistive devices would create a vast new class of ADA beneficiaries who, in fact, should readily be disqualified from protection because of the absence of constraints on their daily lives. Their prevalent, correctable conditions allow them to function within "the economic mainstream of our society" (S. Rep. No. 116, at 10; H.R. Rep. No. 485, Pt. II, at 34); they are not part of a "discrete and insular minority who have been faced with restrictions and limitations," 42 U.S.C. § 12101(a)(7).

Ignoring mitigating measures in determining disability creates unfairness instead of parity in the provision of benefits. It subjects those with correctable impairments to a "different standard" than persons who have no way to alleviate their conditions. *Gilday*, 124 F.3d at 767 (Kennedy, J., concurring in part and dissenting in part). It is only the latter group who must demonstrate that they are actually severely restricted in their daily lives in order to come within the statute's protections, while individuals who are less impaired due to their use of medication or other aids—but whose underlying conditions are more severe—are covered by the statute. Such results do obvious damage to the even-handed treatment of plaintiffs under the ADA.

II. AN EMPLOYEE CANNOT QUALIFY AS DISABLED UNDER THE "REGARDED AS" PRONG MERELY BECAUSE HE FAILED TO SATISFY AN OBJECTIVE REQUIREMENT OF A SPECIFIC JOB

The Tenth Circuit correctly held that UPS did not regard Murphy as disabled so as to bring him within the ADA's third definition of "disability," because UPS did not have "an unsubstantiated fear that he would suffer a heart attack or stroke." Pet. App. 5a (quoting 29 C.F.R. pt. 1630.2(l) app.). "Rather, UPS terminated Mr. Murphy because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." *Ibid.* Thus, UPS did not act based on "reflexive reactions" to a perceived handicap, but on a "reasoned and medically sound judgment" expressed by the DOT. *School Bd. v. Arline*, 480 U.S. 273, 285 (1987) (discussing "regarded as" prong of Rehabilitation Act, from which ADA provision was drawn).

As the Tenth Circuit recognized, the focus of the "regarded as" prong is "not on [the plaintiff] and his actual abilities, but rather on the reactions and perceptions of the persons interacting or working with him." *Kelly v. Drexel Univ.*, 94 F.3d 102, 108-109 (3d Cir. 1996). See also H.R. Rep. No. 485, Pt. III, 101st Cong., 2d Sess. 30 (1990) ("The perception of the covered entity is a key element of [the 'regarded as'] test"); *Deas v. River West, L.P.*, 152 F.3d 471, 476 n.9 (5th Cir. 1998) ("Under the 'regarded as' prong, the disability status of the plaintiff turns not on the plaintiff's physical condition, but rather on how the plaintiff was perceived and treated by those individuals alleged to have taken discriminatory action"); *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156, 172 (4th Cir. 1997) (same). The plaintiff must show that he is perceived as having an impairment that substantially limits a major life

activity. 42 U.S.C. § 12102(2)(C); see, e.g., *Dutcher*, 53 F.3d at 727; *Ryan*, 135 F.3d at 872.

The Government and petitioner insist that Murphy's inability to obtain DOT certification is sufficient to establish that UPS regarded him as disabled in the major life activity of working. That argument is meritless. It ignores the fact that it is the employer's subjective intent that is important under the "regarded as" prong. *Francis v. City of Meriden*, 129 F.3d 281, 284 (2d Cir. 1997) (liability under the "regarded as" prong "turns on the employer's perception of the employee, a question of intent, not whether the employee has a disability"); *Deas*, 152 F.3d at 480 ("the plaintiff bears the burden of making a prima facie showing that the impairment, as the defendant perceived it, was substantially limiting"). The termination of an employee for his failure to satisfy the objective requirements of a specific job simply does not give rise to an inference that the employer had a forbidden "intent." See *Forrisi v. Bowen*, 794 F.2d 931, 934-935 (4th Cir. 1986) (employee whose acrophobia prevented him from doing necessary climbing for job was not "regarded as" disabled); *Dutcher*, 53 F.3d at 728 (plaintiff denied welding position because she could not climb with injured arm was not "regarded as" disabled). Moreover, where, as here, the employment decision is grounded on an independent, government-supplied standard, there is no employer input *at all* with respect to the underlying basis for disqualification. The contention that recovery should be allowed under these circumstances is, therefore, all the more unreasonable.⁶

⁶ The Government objects that an employer could always escape liability by claiming that it perceived the employee as unable to satisfy an element of the job. But an employer cannot prevail in an ADA case by setting forth a rationale for its decisions that is mere pretext. And if the employer does act due to its misperception that

Congress's stated purpose in adopting the "regarded as" prong was to combat "society's accumulated myths and fears about disability and diseases." H.R. Rep. No. 485, Pt. II, at 53; S. Rep. No. 116, at 24 (each citing *Arline*, 480 U.S. at 284); see also 29 C.F.R. pt. 1630(l) app. (reciting legislative history). In view of this aim, courts have recognized that the employer's opinion about the restrictions imposed by the employee's purported impairment must be inaccurate. See, e.g., *Francis*, 129 F.3d at 286-87 ("The [ADA] reach[es] discrimination where an individual does not have a physical impairment but is erroneously perceived as having one," and "address[es] the problem of the employer who, based on nothing more than superstition or irrational fear, regards an individual as having a substantially limiting impairment when the individual is either capable of working or has no impairment at all"); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) (dismissing "regarded as" claim as there was no evidence that employer's perception was "based upon speculation, stereotype, or myth"). The Government disputes the need for such a showing. But the requirement of some kind of *misperception* on the employer's part follows from the regulations' explication of what it means to be "regarded as" disabled.

The regulations say that an individual fits under the "regarded as" prong if he (i) has an impairment that is not substantially limiting but is treated as having such an impairment, (ii) has an impairment that is substantially limiting only as a result of the attitudes of others, or (iii) does not have an impairment but is treated as having a

an impairment barred an employee from a large class of jobs, it may be held responsible. See *Cook v. Rhode Island*, 10 F.3d 17, 26 (1st Cir. 1993) (affirming judgment for plaintiff where defendant believed her obesity foreclosed her from a broad range of employment).

substantially limiting impairment. 29 C.F.R. § 1630.2(l). The common thread through these three criteria is that the employer must mistake the reality of the plaintiff's situation. UPS's accurate application of legally mandated health standards does not meet that requirement; such objective decisions are simply not the "evils" the "regarded as" test seeks to rectify. See *Wooten*, 58 F.3d at 385-386 (plaintiff's termination was due to physical restrictions imposed by his doctor, not an erroneous perception, and so there was no indication that defendant regarded him as having a substantially limiting impairment).

UPS's termination of Murphy was also proper because "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general."⁷ *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993). Instead, the employer must view "the employee's impairment [as] foreclos[ing] generally the type of employment involved." *Forrisi*, 794 F.2d at 935; see also *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) ("an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act").

The EEOC regulations reflect this same analysis:

The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as

⁷ For this reason, even if it is accurate to characterize the DOT's guidelines on blood pressure above 160/90 as permissive rather than mandatory—which would render UPS's termination of Murphy discretionary—Murphy still has not made his case.

compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). Murphy's claim falls on the wrong side of these standards. His blood pressure was too high for him to be able to do the driving that was an integral part of the UPS position and, thus, he was fired because could not perform an essential function of *that particular mechanic job*. See, e.g., *Chandler*, 2 F.3d at 1392-1393 (plaintiffs could not prove that they were "regarded as" disabled where "[t]he only relevant limitation perceived by the City regarding the plaintiffs' ability to work concerned their abilities to drive City vehicles on the job without risk to themselves or others"); *Deas*, 152 F.3d at 481-482 (defendant did not regard plaintiff who suffered seizures as "disabled" in working, but only as "substantially limited as to * * * a few, highly specialized jobs that required relatively high levels of vigilance or uninterrupted awareness"). Murphy was, and is, perfectly capable of performing other mechanic jobs for which he does not have to pass DOT tests.⁸

A ruling that UPS regarded Murphy as disabled would, therefore, upset the uniform consensus that the mere incapacity to meet a certain job's physical requirements does not render an employee "disabled." Absent such a rule, *all*

⁸ That Murphy has continually worked as a mechanic for more than two decades negates the Government's argument that DOT certification should be used as a proxy for a "class of jobs." Murphy's elevated blood pressure clearly leaves many employment options in his field open to him, and he has taken advantage of them.

employees who were fired or denied a specific position for that reason could automatically qualify for coverage under the ADA. That would again subvert the Act's purpose to protect only those with substantially limiting conditions. In addition, employers would be stripped of their ability to rely in good faith on the results of post-offer, pre-employment medical exams. See 29 C.F.R. § 1630.14(b) (employers may condition offers upon the outcome of medical tests or inquiries, provided each entering employee for that job category is subjected to the same examination). That could have disastrous consequences in cases where the job, whether it be commercial truck driver, airline pilot, or police officer, implicates public safety.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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